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## Corruption and the Foreign Corrupt Practices Act of 1977

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## **CORRUPTION AND THE FOREIGN CORRUPT PRACTICES ACT OF 1977**

The Foreign Corrupt Practices Act<sup>1</sup> (FCPA) may strike most lawyers at first glance as a broad proscription of illegal payments by Americans to foreign government officials. The Act's inclusion, by amendment, within the Securities Exchange Act of 1934<sup>2</sup> labels the FCPA as part of the general securities regulation scheme. A close examination of the FCPA, however, leads to a different impression. First, the FCPA is not a broad proscription; the final Act forbids the authorization of those payments made "corruptly" with an intent to improve a business relationship. Second, the enforcement mechanism created in conjunction with the Act goes far beyond suppressing bribery; the accounting provisions embodied in the FCPA are stepping stones in the path to a new control environment for corporate activities. Above all the FCPA must be construed in light of its multinational, multicultural application, since the essence of the Act is to regulate activities abroad.

The FCPA is not a traditional securities regulation. Primarily, the Act is a response to the widespread criticism of American corporations for violating the laws of other nations.<sup>3</sup> Since these violations were first uncovered by the Securities Exchange Commission (SEC), the Congress has given the Commission a leading role in regulating the activities of multinational corporations to enforce the FCPA.

The SEC became involved in the problem of foreign bribery by American corporations indirectly. Investigations by the Watergate Special Prosecutor's Office into illegal domestic campaign

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<sup>1</sup> Pub. L. No. 95-213, 91 Stat. 1494 (1977). The FCPA has been codified as follows: § 102 of the FCPA, 15 U.S.C. § 78m(b)(2), (3) (Supp. I 1977); § 103 (except § 103(b)(2)) of the FCPA, 15 U.S.C. § 78 dd-1 (Supp. I 1977); § 103(b)(2) of the FCPA, 15 U.S.C. § 78ff(c) (Supp. I 1977); § 104 of the FCPA, 15 U.S.C. § 78dd-2 (Supp. I 1977).

On May 5, 1977, the Senate unanimously passed a predecessor bill, S. 305, without amendment. The House, on Nov. 1, 1977, amended the Senate bill, substituting in its place a House version, H.R. 3815. The bill then went to the Conference Committee where the final Act was drafted. President Carter signed the Act on Dec. 19, 1977. It has not been amended as of this writing.

<sup>2</sup> 15 U.S.C. 78a-78hh (Supp. I 1977).

<sup>3</sup> For the goals of Congress in passing the FCPA, see notes 20-29 and accompanying text *infra*.

contributions led that office to examine Americans' foreign campaign contributions, regardless of whether those contributions were intended to remain abroad or were to be laundered for later use in the United States. Members of the SEC staff recognized that these corporate contributions were of sufficient interest to investors to warrant disclosure.<sup>4</sup> The SEC inquiry into illegal contributions revealed that the payments were made possible by falsified corporate financial statements which concealed the source and application of corporate funds.<sup>5</sup> These investigations also revealed the existence of slush funds from which money was discharged for bribes and other illicit purposes.<sup>6</sup> The existence of such hidden funds made financial statements filed with the SEC inaccurate.<sup>7</sup>

This article first discusses the business activities and competing interests which prompted congressional action. Part II analyzes the FCPA and attempts to solve the ambiguities inherent in the criminalization provisions,<sup>8</sup> thereby clarifying which activities are proscribed by the FCPA and what is meant by the Act's

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<sup>4</sup> *Activities of American Multinational Corporations Abroad; Hearings before the Subcomm. on International Economic Policy of the House Comm. on International Relations*, 94th Cong., 1st Sess. 36 (1975) (statement of SEC Commissioner Phillip A. Loomis, Jr.) [hereinafter cited as *Activities of American Multinational Corporations Abroad*]; SEC Reg. 13B-2, "Maintenance of Records and Preparation of Required Reports," 44 Fed. Reg. 10,964 (1979) (to be codified in 17 C.F.R. §§ 240.13b2-1, 240.13b2-2).

A recent note pointed out that the SEC can only demand disclosure of financially significant payments. Payments which are particularly large would probably fall within the disclosure requirements. See Note, *Foreign Bribes and the Securities Laws' Disclosure Requirements*, 74 MICH. L. REV. 1222 (1976). Potential investors would certainly be interested, for example, in the \$4,300,000 which Gulf Oil paid in foreign political contributions, as well as the \$4,800,000 Gulf paid domestically. *Multinational Corporations and United States Foreign Policy; Hearings before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations*, 94th Cong., 1st Sess. 1 (1975) (statement of Senator Frank Church) [hereinafter cited as *Multinational Corporations and United States Foreign Policy*].

<sup>5</sup> *Activities of American Multinational Corporations Abroad*, *supra* note 4, at 36.

<sup>6</sup> *Id.* (statement of SEC Commissioner Phillip Loomis).

<sup>7</sup> These statements were filed pursuant to the registration requirements of §§ 13 and 15(d) of the Securities Exchange Act of 1934. 15 U.S.C. §§ 78m, 78o(d) (1976). The Exchange Act requires registration statements by certain securities issuers on an annual or quarterly basis. See A. CONARD, *CORPORATIONS IN PERSPECTIVE*, 289-92 (1976) [hereinafter cited as A. CONARD]. The SEC also became aware of bribery through routine investigations, such as were conducted in SEC v. United Brands, No. 75-0509 (D.D.C. Jan. 27, 1976), reprinted in [1975-76 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,420, discussed in note 17 *infra*, in which the Commission investigated the company following the suicide of its chief officer. *Activities of American Multinational Corporations Abroad*, *supra* note 4, at 37 (statement of SEC Commissioner Phillip Loomis).

<sup>8</sup> This article does not discuss Title II of the FCPA: The Domestic and Foreign Investment Improved Disclosure Act of 1977. Nor are the tax consequences under § 162(c) or § 952 of the Internal Revenue Code discussed here. See generally Note, *Penalizing Bribery of Foreign Officials Through the Tax Laws: A Case for Repealing Section 162(c)(1)*, 11 U. MICH. J.L. REF. 73 (1977).

corruption requirement. Finally, Part III examines the possibilities for multinational agreements prohibiting bribery.

## I. THE ROLE OF QUESTIONABLE PAYMENTS IN FOREIGN COMMERCIAL TRANSACTIONS.

There is little new or startling in the revelation that American businessmen have made bribe payments while operating abroad.<sup>9</sup> The amounts of the bribes and the important positions of the recipients, however, were not fully appreciated by Americans until very recently. The final Senate Report<sup>10</sup> on the FCPA alleged that over 300 United States companies had paid "hundreds of millions of dollars" to foreign government officials.<sup>11</sup> These vast sums were largely limited to certain industries, particularly the military weapons, aircraft, and oil industries. These revelations prompted Congressional action.<sup>12</sup>

Pressures on American companies to make illicit payments vary greatly. Payments have been made in a myriad of transactions, but the following three patterns emerge: bribery for government contracts, demands for protection money, and bribery for regulatory favors.

In many foreign nations, particularly in the Middle East and Latin America, local agents have customarily been used to negotiate contracts with local governments. Typically, a Defense Security Assistance Agency memorandum entitled "Agent's Fees in the Middle East,"<sup>13</sup> which was circulated among various American industries, strongly hinted that companies should pay lucrative fees to local agents and should allow the agents discretion to distribute the money among local officials. As the memorandum suggested, "[o]bviously the agent with the greatest margin of the profit or percentage [sic] has a distinct advantage over those with a lesser fee in that greater 'influence' can be applied to all personnel in the governmental decision-making chain."<sup>14</sup> This fee

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<sup>9</sup> *Activities of American Multinational Corporations Abroad*, *supra* note 4, at 24, 28 (statement of Mark B. Feldman, Deputy Legal Advisor, Department of State).

<sup>10</sup> Senate Report of S. 305, S. REP. NO. 95-114, 95th Cong., 1st Sess. 3 (1977) [hereinafter cited as SENATE REPORT], reprinted in [1977] U.S. CODE CONG. & AD. NEWS 4098, 4100-4101.

<sup>11</sup> While newspaper reporters and several senators seemed convinced that over \$200 million had been spent on "agent's fees" and political contributions, more conservative sources have estimated expenditures at close to \$60 million. *Activities of American Multinational Corporations Abroad*, *supra* note 4, at 100 (statement of Donald I. Baker, Deputy Assistant Attorney General for Anti-Trust).

<sup>12</sup> For further discussion of the goals of the FCPA, see notes 20-29 and accompanying text *infra*.

<sup>13</sup> *Activities of Multinational Corporations Abroad*, *supra* note 4, at 100.

<sup>14</sup> *Id.* at 101. The agent's fee can vary from 5% to 20% of the contract price. See Letter

was often tacked on to the contract price and, in effect, paid by the foreign nation to the American corporation in a kick-back transaction, making the payment less objectionable to the corporation.<sup>15</sup>

Some of the payments were not of the agent-commission nature but were simply protection money. For example, Gulf Oil was persuaded to contribute four million dollars to the ruling party in South Korea. This experience convinced Gulf's chairman that United States legislation was needed to protect business.<sup>16</sup>

A traditional objective of bribery is favorable legislation or regulation. An example of this type of corruption may be found in United Brands' payment to the president of Honduras in return for tax relief.<sup>17</sup> The preceding cases illustrate the type of extortion and corruption in which multinational corporations are involved abroad<sup>18</sup> and illustrate the backdrop of the FCPA.

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from Alexander Hehmeyer to Philip Heymann (Oct. 5, 1978), *reprinted in* Wall St. J., Oct. 17, 1978, at 26, col. 4. This letter also provides an intriguing description of the State Department attitude towards agents' fees.

<sup>15</sup> The deleterious effects on that corporation and on the United States foreign policy, however, remain the same, and comprise the primary goal of the Act. See note 20 and accompanying text *infra*.

<sup>16</sup> *Political Contributions to Foreign Governments; Hearings before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations*, 94th Cong., 1st Sess. 4-10, 54-55 (1975) (statement of Robert Dorsey) [hereinafter cited as *Political Contributions to Foreign Governments*].

Following the Korean War, the United States government sought to stabilize the government of South Korea by encouraging United States investment. Korea was given assistance through loans from the Agency for International Development to participate in joint ventures insured by the Overseas Private Investment Corporation. The Gulf refinery in South Korea was the single largest private foreign investment in South Korea. In 1966, high officials of South Korea's ruling Democratic Republic Party demanded a \$1,000,000 campaign contribution from Gulf. The demand "left little to the imagination as to what would occur if the Company would choose to turn its back on the request." Gulf's Chairman, Robert Dorsey, paid the money believing the payments were in the best interests of the corporation. In the 1971 Korean election, the Party felt more insecure and won with only 51% of the popular vote. Consequently, a Mr. S. K. Kim, financial chairman of the Party, demanded \$10,000,000 from Gulf. Mr. Dorsey was offended both by the amount and by Mr. Kim's rude, gangster-like approach, and so paid a mere \$3,000,000. This apparently satisfied the Party.

<sup>17</sup> SEC v. United Brands, No. 75-0509 (D.D.C. Jan. 27, 1976), *reprinted in* [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,420, was the first case concerning multinational bribery brought by the SEC. The company had advised shareholders of a reduction in the Honduras export tax. The company did not report that it had agreed to pay \$2.5 million in bribes. Eventually, United Brands only paid \$1.5 million to the President of Honduras to reduce the local tax on bananas, one of the country's few exports. Following the disclosure of this information, the corporation's stock plunged 40%, its holdings in Panama were expropriated, and its tax and tariff concessions in Honduras were revoked. Gwirtzman, *Is Bribery Defensible?* N.Y. Times, Oct. 5, 1975, § 6 (Magazine) at 100, Col. 2. [hereinafter cited as Gwirtzman]. Bribery of this type is omitted from the coverage of the FCPA through the business purpose limitation. See notes 136-139 and accompanying text *infra*.

<sup>18</sup> Many multinational corporations have responded by instituting strict policies against

These payment situations involve five parties: American-based corporations, foreign-based corporations, a nation to be influenced by the bribe (or "bribe-target nation"), a nation which has corporations that compete with American corporations, and the United States government.<sup>19</sup> The competing interest of these parties provide the actors upon whom the FCPA operates.

The congressional objectives underlying the FCPA are difficult to simplify. While a plethora of policy considerations were presented during the congressional hearings, some concerns re-occurred. Perhaps the most frequently voiced was a concern over the public scandals engendered by bribery in major industrial nations.<sup>20</sup> When an American corporation bribes a foreign government official, the bribe reflects unfavorably on the United States.<sup>21</sup> While a corporation may be legally distinct from the government, many foreigners see the corporation as an instrument of United States policy. Hence, the United States is often blamed for a scandal in which the government played no part. In these circumstances, American companies are, in effect, making foreign policy for the government. Another congressional goal was to prevent the spread of corruption in friendly governments. Corruption weakens an ally's government by allowing improper influences to grow and diminishing respect among its people.<sup>22</sup> A third goal was to prevent the distortion of commercial competition caused by bribery.<sup>23</sup> Bribery causes sales to be made not on the

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illicit payments. These include General Dynamics, DuPont and Pitney Bowes. *Foreign and Corporate Bribes; Hearings before the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2nd Sess. 1 (1976) [hereinafter cited as *Foreign and Corporate Bribes*].

<sup>19</sup> Additionally, there are divisions within the parties. American corporations include those which wish to pay bribes and those which abstain from such activities. Some bribe-target nations are concerned about government officials accepting outside remuneration; others consider payments of this nature to be perfectly legitimate. Foreign competing industrial nations are also split between those which favor an elimination of illicit payments and those which feel such payments are not a problem.

For a further discussion of the interests involved, see notes 186-192 and accompanying text *infra*.

<sup>20</sup> Congress was specifically concerned about scandals in Japan, Italy and the Netherlands. SENATE REPORT, *supra* note 10, at 3-4.

<sup>21</sup> SENATE REPORT, *supra* note 10, at 3.

<sup>22</sup> H.R. REP. NO. 95-640, 95th Cong. 1st Sess. 5 (1977) [hereinafter cited as HOUSE REPORT]; *Protecting the Ability of the United States to Trade Abroad; Hearings on S. Res. 265 Before the Subcomm. on International Trade of the Senate Comm. on Finance*, 94th Cong., 1st Sess. 13, 63 (1975), [hereinafter cited as *Protecting the Ability of the United States to Trade Abroad*]; *Foreign and Corporate Bribes*, *supra* note 18, at 40; *Abuses of Corporate Power; Hearings before the Subcomm. on Priorities and Economy in Government of the Joint Economic Comm.*, 94th Cong., 2nd Sess. 100 (1975), [hereinafter cited as *Abuses of Corporate Power*].

<sup>23</sup> *Protecting the Ability of the United States to Trade Abroad*, *supra* note 22, at 34,

basis of product quality, but on the amount of the bribe. However, where a payment is made as a legal, legitimate and integral part of the foreign nation's decision-making process, all competitors should be on an equal basis before the law. This concern is reflected in the FCPA's corruption requirement.<sup>24</sup> Fourth, the Congress wished to minimize foreign mistrust of American businessmen and to improve the American reputation for honesty in business dealings.<sup>25</sup> Thus, the Act creates domestic prohibitions for the purpose of aiding foreign governments in their attempts to prevent corruption. The Congress sought to avoid antagonizing foreign governments and so excluded foreign subsidiaries of American corporations from coverage of the Act.<sup>26</sup> Finally, the Congress did not wish to cripple unnecessarily American business activities abroad. To this end, a distinction was created between payments to discretionary and ministerial officials.<sup>27</sup> Only payments to discretionary officials are proscribed.<sup>28</sup> Furthermore, the House and Senate Conference Committee omitted from the coverage of the Act<sup>29</sup> bribes in furtherance of change in regulation or law. The policy behind this omission is unclear.

## II. FOREIGN CORRUPT PRACTICES: CORRUPTION, SECURITIES ISSUERS, DOMESTIC CONCERNS, AND ACCOUNTING STANDARDS

The securities issuer provision, section 103 of the FCPA,<sup>30</sup> pro-

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61; *Foreign and Corporate Bribes*, *supra* note 18, at 88 (statement of Treasury Secretary Simon).

<sup>24</sup> 15 U.S.C. § 78dd-1 (Supp. I 1977). See notes 58-110 and accompanying text *infra*.

<sup>25</sup> *Foreign and Corporate Bribes*, *supra* note 18, at 63, 68.

<sup>26</sup> 15 U.S.C. § 78dd-2(d)(1)(A) & (B). One experienced attorney recalled excruciating past problems with the extra-territorialization of United States commercial laws. *Foreign and Corporate Bribes*, *supra* note 18, at 6-7. (statement of John J. McCloy).

We went through this experience in connection with a determined attempt to extend our antitrust laws abroad. We then encountered heavy resentment on the part of foreign governments. Local laws were passed making it a crime to respond to any American subpoena. . . . In the end that effort to extraterritorialize our laws was generally repelled abroad and the urge to do so here was considerably moderated.

<sup>27</sup> See notes 112-120 and accompanying text *infra*.

<sup>28</sup> See notes 113-120 and accompanying text *infra*.

<sup>29</sup> For a discussion of the business purpose limitation, see notes 136-139 and accompanying text *infra*.

<sup>30</sup> This section (except for § 103(b)(2)) amends § 30 of the Securities Exchange Act of 1934, creating § 30A, and is codified at 15 U.S.C. § 78dd-1 (Supp. I 1977). The Section states:

Sec. 103 "FOREIGN CORRUPT PRACTICES BY ISSUERS"

Sec. 30A. (a) It shall be unlawful for any issuer which has a class of securities registered pursuant to section 12 of this title or which is required to file reports under section 15(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use

scribes payments by a securities issuer or certain persons connected with an issuer to certain types of foreign government officials. The domestic concerns provision, section 104, enacts identical provisions for persons and domestic enterprises other than issuers covered by the securities issuer section.

These sections focus particularly on bribery to influence a foreign official in his job performance, to cause the official to act or fail to act, or to prompt the official to exert his influence with others in the foreign government. The payment must be made corruptly<sup>31</sup> and in order to assist the company in obtaining or retaining business with a person. If an issuer is found to have violated the securities issuer section, then employees and agents connected with that issuer may be prosecuted.<sup>32</sup> Finally, the securities issuer section forbids any issuer from paying, directly or

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of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

(1) any foreign official for purposes of—

(A) influencing any act or decision of such foreign official in his official capacity, including a decision to fail to perform his official functions; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of—

(A) influencing any act or decision of such party, official, or candidate in its or his official capacity, including a decision to fail to perform its or his official functions; or

(B) inducing such party, official or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person; or

(3) any person, while knowing or having reason to know that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—

(A) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, including a decision to fail to perform his or its official functions; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

<sup>31</sup> 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (Supp. I 1977).

<sup>32</sup> See note 50 and accompanying text *infra*.



indirectly, a fine levied under the section against any person convicted of violating the Act.

### A. *Issuers Covered by the Securities Issuer Section*

The FCPA forbids actions by only certain types of issuers and persons. The issuer's section pertains to those enterprises which issue a class of securities registered on a United States national securities exchange in accordance with the procedures under section 12 of the Exchange Act, the general registration provision.<sup>33</sup> Consequently, those issuers with unlisted trading privileges which are *deemed* registered are also included.<sup>34</sup> The issuer's section also covers those securities voluntarily registered.<sup>35</sup> Those issuers who are required to file reports with the SEC, thereby excluding voluntary reporters,<sup>36</sup> are also covered by the FCPA.

The Conference Committee deliberately excluded foreign subsidiaries of American corporations operating abroad<sup>37</sup> in order to avoid jurisdictional questions<sup>38</sup> and unnecessary antagonisms with foreign governments.<sup>39</sup> Although Congress could have held

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<sup>33</sup> 15 U.S.C. § 78i (1976). The Conference Committee Report incorrectly specifies that only issuers required to register under § 12(b) of the Exchange Act, which is the general registration statute, are covered by the FCPA. Compare H.R. CON. REP. No. 95-831, 95th Cong., 1st Sess. 11 (1977), [hereinafter cited as CONFERENCE REPORT], reprinted in [1977] U.S. CODE CONG. & AD. NEWS 4098, 4124 with 15 U.S.C. § 78dd-1(a) (Supp. I 1977).

<sup>34</sup> Unlisted trading privileges are deemed registered under § 12(f)(6). The Conference Report does not specifically mention § 12(f)(6) issuers. The Report mentions only § 12(b) issuers. The wording of the FCPA, however, includes any issuer registered pursuant to § 12, and this presumably includes those deemed registered under § 12(f)(6). See § 103(a), codified at 15 U.S.C. 78dd-1(a) (Supp. I 1977).

<sup>35</sup> Securities may be registered voluntarily pursuant to § 12(g) of the Securities and Exchange Act of 1934.

<sup>36</sup> 15 U.S.C. § 78o(d) (Supp. I 1977). Section 15(d) excludes an issuer from the duty to report during "any fiscal year, other than the fiscal year within which such registration statement became effective, if, at the beginning of such fiscal year, the securities of each class to which the registration statement relates are *held of record* by less than three hundred persons" (emphasis added). Section 15(d) is amended by § 204 of the FCPA, which authorizes the SEC to define the term "held of record." Finally, and particularly relevant to the FCPA, § 15(d) excludes "securities issued by a foreign government or political subdivision thereof" from the duty to report.

<sup>37</sup> 123 CONG. REC. S19,399 (Daily ed. Dec. 6, 1977) (remarks of Sen. William Proxmire); CONFERENCE REPORT, *supra* note 33, at 14.

<sup>38</sup> The distinction between jurisdiction to prescribe and jurisdiction to enforce is an established concept in international law. See N. LEECH, C. OLIVER & J. SWEENEY, *THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS* 110, 111 (1973). Congress lacks authority under international law to forbid conduct by aliens in other countries, unless conduct outside the United States threatens "its security as a state or the operation of its governmental functions. . . ." RESTATEMENT (SECOND) FOREIGN RELATIONS § 33(1) (1965), quoted in *United States v. Pizzarusso*, 388 F.2d 8, 10 (2d Cir.), cert. denied, 392 U.S. 936 (1968). See also *Rivard v. United States*, 375 F.2d 882 (5th Cir.), cert. denied, 389 U.S. 884 (1967).

<sup>39</sup> See note 26 *supra*.

the parent corporation responsible for the acts of its subsidiary under an agency theory,<sup>40</sup> it chose not to do so. Thus the issuer section requires that the United States issuer at least authorize payment. Furthermore, any agency theory prosecution is undercut by the issuer provision's requirement that an employee or agent of an issuer be subject to United States jurisdiction, thereby excluding foreign nationals working for American subsidiaries abroad. Still, if the parent corporation participates in the prohibited conduct, even if it is a postpayment authorization, the parent may be held liable.<sup>41</sup>

### B. *Persons Connected with Issuers*

In addition to those issuers required to register or report by the 1934 Securities Exchange Act, the securities issuer provisions of the FCPA also cover persons related to such issuers. The relationship and purpose of payment required to establish liability, however, is unclear. The section is ambiguous as to whether officers, directors, employees, and agents must be acting on behalf of the issuer, as is clearly required for stockholders. The language of the Act indicates that officers and directors need not be acting on behalf of the issuer and may incur liability through actions of a personal or non-issuer business nature.<sup>42</sup> This formulation represents a change between the Senate bill and the final Act. The Senate bill covered, "any officer, director, employee or stockholder thereof acting on behalf of such issuer."<sup>43</sup> The Senate Report accompanying the bill explained that the provision was intended to make clear that only corporate or business bribery would be prohibited.<sup>44</sup>

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<sup>40</sup> See *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

<sup>41</sup> 15 U.S.C. §§ 78dd-1, 78dd-2 (Supp. I 1977); 123 CONG. REC. H12,824 (daily ed. Dec. 7, 1977). Some courts have raised the question of whether a corporation can be held criminally liable for the implicitly authorized acts of its officers. See, e.g., *Commonwealth v. Beneficial Finance Co.*, 275 N.E.2d 33 (Mass. 1971), *cert. denied*, 407 U.S. 914 (1972). The federal courts have held corporations criminally liable if an officer has acted within the scope of his employment, whether or not his conduct was expressly authorized. *Continental Baking Co. v. United States*, 281 F.2d 137 (6th Cir. 1960); *United States v. John-Manville Corp.*, 231 F. Supp. 690 (E.D. Pa. 1963).

<sup>42</sup> See note 30 *supra*.

<sup>43</sup> (Emphasis added). SENATE REPORT, *supra* note 10, at 17.

<sup>44</sup> "Whether or not a particular situation involves bribery by the corporation or by an individual acting on his own will depend on all the facts and circumstances, including the position of the employee, the care with which the board of directors supervises management, the care with which management supervises employees in sensitive positions and its adherence to the strict accounting standards set forth in section 102." SENATE REPORT, *supra* note 10, at 11.

The Conference Committee changed the wording as if to indicate a new meaning, but did not elaborate.<sup>45</sup> The final wording is "any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, . . ."<sup>46</sup> The new wording was repeated in the criminal penalties portion of the issuer section,<sup>47</sup> listing officers and the directors separately from stockholders, thereby seeming to require that only the stockholder be acting on behalf of an issuer.<sup>48</sup> A separation of required motive is indicated by the change in language, a change which could hardly be accidental. Therefore, an officer, director, employee, or agent need not be acting on behalf of an issuer in order to incur liability under the Act. For a payment to be proscribed, however, it must be made to obtain or retain business with a person.<sup>49</sup>

With an eye to this distinction, a scenario may be drawn wherein an officer or director of a corporation, without that corporation's authority, bribes a government official so as to allow that corporation to do business with a person. This situation may arise particularly with regard to lists of government-approved suppliers or contractors. In such a case, the director or officer could be convicted under the FCPA.<sup>50</sup>

The language of the Act clearly requires that the stockholder be acting "on behalf of" the issuer. The phrase "on behalf of" must be interpreted in connection with the business purpose limitation in this section.<sup>51</sup> In context, "on behalf of" means the per-

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<sup>45</sup> CONFERENCE REPORT, *supra* note 33, at 12.

<sup>46</sup> (Emphasis added). 15 U.S.C. §§ 78dd-1, 78dd-2 (Supp. I 1977).

<sup>47</sup> Amending § 32A of the Securities Exchange Act of 1934; 15 U.S.C. § 78ff(a) (Supp. I 1977).

<sup>48</sup> 123 CONG. REC. H12,826 (daily ed. Dec. 7, 1977).

<sup>49</sup> See notes 110-112 and accompanying text *infra*.

<sup>50</sup> Employees and agents are separated from other persons covered by 15 U.S.C. § 78ff, and their liability is conditioned upon the issuer's conviction. See note 175 *infra*. Officers and directors are the only persons who may be convicted without the issuer's participation; stockholders must be acting on behalf of the issuers.

One possible policy explanation is that officers and directors have more control over issuers than do employees or agents. The House Bill, H.R. 3815, included "any natural person in control of such an issuer," (emphasis added) along with any officer or director of an issuer. This provision was dropped in conference, but the idea may have survived in broader liability for officers and directors. Officers and directors have greater control and their liability may substitute for that of the issuer's.

This interpretation is consistent with Congressional objectives in the field of securities laws, which are to protect the issuer's investors. When a corporate officer or director engages in bribery which is related to the corporation even though not for its benefit, that officer or director jeopardizes the corporation's standing in the foreign country. Investors are entitled to be protected from this behavior by the corporation's officers and directors. This type of protection for investors is not part of the general disclosure-oriented securities regulation regime.

<sup>51</sup> See notes 136-139 and accompanying text *infra*. Since the purpose of the bribe must

son is paying corporation money to an official with the corporation's authorization.<sup>52</sup>

### C. Domestic Concerns

The domestic concern section<sup>53</sup> prohibits the same type of activities by individuals and domestic companies that the securities provision does for issuers. Since this section excludes from coverage those firms covered by the securities issuer provision of the FCPA, "domestic concerns" and "issuers" are mutually exclusive.<sup>54</sup>

The House version of the FCPA was only slightly different in that it extended coverage to United States-controlled foreign subsidiaries.<sup>55</sup> The Senate version, accepted by the Conference Committee, required that the domestic concern (1) be owned and controlled by individuals subject to United States jurisdiction and (2) have its principal place of business in the United States. This conjunction was designed to avoid the jurisdictional, enforcement, and diplomatic difficulties raised by extra-territorializing the enforcement of this section.<sup>56</sup> By including not only United States citizens, but any person subject to United States jurisdiction, Congress has provided for the prosecution of foreign nationals provided they act on behalf of a domestic concern.<sup>57</sup>

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be to assist the issuer, the issuer always has a relationship with the proscribed payment. The phrase "on behalf of" denotes acting with the corporation's authority.

<sup>52</sup> See SENATE REPORT, *supra* note 10, at 11.

<sup>53</sup> 15 U.S.C. § 78dd-2 (Supp. I 1977).

<sup>54</sup> Section 104 of the FCPA excludes issuers covered by § 103 and covers "domestic concerns." "Domestic Concerns" are defined by § 104 as

(A) any individual who is a citizen, national, or resident of the United States; or  
(B) any corporation, partnership, association, joint-stock company, business trust, unincorporated association, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession or commonwealth of the United States.

15 U.S.C. § 78dd-2(d)(1) (Supp. I 1977). Jurisdiction is acquired if the individual has sufficient connection with the United States, if the concern has its principal place of business in the United States, or if the concern is organized under United States law.

<sup>55</sup> House Report on H.R. 3815, H.R. REP. No. 95-640, 95th Cong., 1st Sess. 12 (1977) [hereinafter cited as HOUSE REPORT]; 123 CONG. REC. H11,932 (daily ed. Nov. 1, 1977) (remarks of Rep. Eckhardt).

<sup>56</sup> CONFERENCE REPORT, *supra* note 33, at 13-14.

<sup>57</sup> *Id.*

### D. "Corruptly in furtherance of"

What makes an action "corruptly in furtherance of" gaining influence? This phrase is the most difficult language in the FCPA to interpret, yet some understanding of its relationship to bribery is necessary. The prosecutor or plaintiff<sup>58</sup> must prove that the payment was made corruptly.<sup>59</sup>

Congress has indicated an intent to allow the courts to use the corruption requirement for the exclusion of persons engaged in essentially benign transactions.<sup>60</sup> For example, an extortion situation in which a foreign official threatened to destroy company property unless paid was explicitly excluded through the corruption requirement.<sup>61</sup> This hypothetical situation is extreme and non-controversial, but leaves uncertain the full parameters of the corruption requirement.

To delineate activities which are corrupt, this section of the article reviews the case law relating to corruption and bribery and then proposes a definition which should be applied to the FCPA. The examination reveals that an *illegal influence on the foreign*

<sup>58</sup> The legislative history of the FCPA and the analysis used by the United States Supreme Court in *Cort v. Ash*, 422 U.S. 66 (1975) indicates that a private cause of action exists under the FCPA. See note 179 *infra*.

<sup>59</sup> 15 U.S.C. §§ 78dd-1, 78dd-2 (Supp. I 1977). The burden of proving that the payment was made corruptly rests upon the prosecutor or plaintiff. The HOUSE REPORT, *supra* note 55, at 8, recommended that the courts look to the domestic bribery statute, 18 U.S.C. § 201 (1978), to interpret the FCPA. Under the domestic statute a corrupt intent must be proven by the prosecutor. See, e.g., *United States v. Strand*, 574 F.2d 993, 996 (9th Cir. 1978); *United States v. Evans*, 572 F.2d 455, 480-81 (5th Cir. 1978); E. DEVITT & C. BLACKMAR, *Federal Jury Practice and Instructions* § 34.05 (3d ed. 1978) [hereinafter cited as E. DEVITT & C. BLACKMAR].

<sup>60</sup> The Senate Report explained:

The word "corruptly" is used in order to make clear that the offer, promise or gift, must be intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payor or his client, or to obtain preferential legislation or a favorable regulation. The word "corruptly" connotes an evil motive or purpose, an intent to wrongfully influence the recipient.

SENATE REPORT, *supra* note 10, at 10.

The House Report on H.R. 3815 was vague as to its own definition of corruption. HOUSE REPORT, *supra* note 55, at 8. At one point it defines "corruptly" as connoting "an evil motive or purpose such as that required under [the domestic federal bribery statute]." The domestic bribery statute has been interpreted by the courts as requiring an intentional violation, motivated by evil. See notes 81-82 and accompanying text *infra*. On the House floor, Representative Eckhardt explained that the "corrupt purpose must be to induce the recipient to influence any official act or decision of a government." 123 CONG. REC. H11,932 (daily ed. Nov. 1, 1977).

These statements give little guidance. The Senate Report specifies an "evil" motive, which is extraordinarily vague. The House comments are also unclear, since even a payment for a ministerial action, which is legal under the FCPA, would influence an official act. Thus, these legislative sources provide little or no guidance for understanding corruption.

*nation's decision-maker* is integral to bribery and corruption under the FCPA.

1. *Case law and analogous statutes* — Common law bribery has evolved over the years and the concept of "corruption" has normally been connected with bribery.<sup>62</sup> Statutes have expanded the notion of bribery, sometimes creating "improper gratuity" provisions which do not require a corrupt purpose.<sup>63</sup>

The constitutional limits on what may be considered bribery were explored recently in *United States v. Dansker*,<sup>64</sup> where the Third Circuit interpreted a New Jersey bribery statute<sup>65</sup> in connection with the Travel Act,<sup>66</sup> which forbids the use of the facilities of interstate commerce with the intent to further any unlawful activity, including bribery. The state bribery statute forbade the giving or receiving of any money to obtain any "act or thing connected with or appertaining to" the government, without regard to corrupt purposes or the recipient's position. The vice-chairman of a local parking authority was convicted without proof that he had received the money in return for using his government position to aid the payor.<sup>67</sup> The court reversed the conviction, holding that the statute must include a corruption requirement to avoid violation of the defendant's First Amendment rights. The court stated:

[I]n order to establish a violation of the statute, it must be demonstrated: (a) that the alleged recipient, whether he be a public official or not, possessed at least the appar-

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<sup>61</sup> See SENATE REPORT, *supra* note 10, at 11.

<sup>62</sup> Bribery has been defined at common law as "the voluntary giving or receiving of anything of value in corrupt payment for an official act done or to be done with the corrupt intent to influence the action of a public official or of any other person professionally concerned with the administration of public affairs." 12 AM. JUR. 2d *Bribery* § 2 (1964). See also 18 U.S.C. § 201(b) (1978); *Vinyard v. United States*, 335 F.2d 176, 182 (8th Cir.), *cert. denied*, 379 U.S. 930 (1964).

<sup>63</sup> See 18 U.S.C. § 201(f)-(h) (1976), discussed in note 85 *infra*.

<sup>64</sup> 537 F.2d 40 (3rd Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). *Accord*, *United States v. Forsythe*, 560 F.2d 1127, 1137-38 (3rd Cir. 1977).

<sup>65</sup> N.J. STAT. ANN. § 2A: 93-6 (West 1953) provided:

Any person who directly or indirectly gives or receives . . . any money, real estate, service or thing of value as a bribe, present or reward to obtain . . . any . . . act or thing connected with or appertaining to any office or department of the government of the state . . . or other political subdivision thereof, or of any public authority, is guilty of a misdemeanor.

<sup>66</sup> 18 U.S.C. § 1952 (1978). Bribery under the Travel Act includes not only common law bribery but any state statutes which may be classified as prohibiting bribery. *United States v. Nardello*, 393 U.S. 286, 295 (1968).

<sup>67</sup> The defendant was politically active and had been publicly opposed to a zoning variation for a real estate development. In return for \$600,000 he reversed his stand and supported a modified construction plan. See *United States v. Dansker*, 537 F.2d 40, 44-45 (1976).

ent ability to influence the particular public action involved; and (b) that he agreed to exert that influence in a manner which would *undermine the integrity of that public action*.<sup>68</sup>

Thus, the *interest* protected by bribery laws is the integrity of the public decision-making process; when a payment does not injure that integrity, it is not bribery. Although *Dansker* concerned a state statute, the FCPA must also be construed to avoid infringing on the First Amendment. At rock bottom, "corruption" under the FCPA should therefore require an injury to the integrity of government decision making.

The term "corruptly" has also been utilized by Congress in the federal perjury<sup>69</sup> and domestic bribery statutes.<sup>70</sup> Unfortunately, cases arising under these statutes have dealt with the issue in a cursory manner.<sup>71</sup> Moreover, the cases have all concerned corruption in an exclusively American setting, where there exists a commonly understood standard of ethics and morality. By contrast, the FCPA concerns an international setting.<sup>72</sup>

With respect to perjury, courts have required that an indictment aver that sworn testimony was given "corruptly."<sup>73</sup> "Corruptly" in this context has been held to mean "viciously, [or] wickedly."<sup>74</sup> The concepts of willfulness and voluntariness have also been employed in defining corruption in the context of perjury.<sup>75</sup> Although there is precedent to the effect that perjury

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<sup>68</sup> *Id.* at 49 (emphasis added).

<sup>69</sup> 18 U.S.C. § 1621 (perjury). The corruption requirement has been implied by the courts into the perjury statute. See *Beckanstin v. United States*, 232 F.2d 1, 4 (5th Cir. 1956); *United States v. Rose*, 215 F.2d 617, 622-23 (3d Cir. 1954).

<sup>70</sup> 18 U.S.C. § 201 (1976) (domestic bribery). "Corruptly" is also the level of intent required under the federal obstruction of justice statute, 18 U.S.C. § 1503 (1976).

<sup>71</sup> See, e.g., *United States v. Labovitz*, 251 F.2d 393, 394 (3rd Cir. 1958); *United States v. Piazza*, 148 F.2d 334 (2d Cir. 1945). Dissatisfaction with the vagueness in judicial construction of the term "corruptly" prompted the draftsmen of the Model Penal Code to adopt a "pecuniary benefits" standard. See MODEL PENAL CODE § 240.1, Status of Section (Proposed Official Draft, 1962). See also notes 88-89 and accompanying text *infra*.

<sup>72</sup> For a particularly poignant example of how the international setting can affect business, see the plight of Translinear, Inc., as it attempted to rescue its plant from the Haitian government. *Abuses of Corporate Power*, *supra* note 22, at 115.

<sup>73</sup> *United States v. Rose*, 215 F.2d 617, 623-24 (3rd Cir. 1954). The court stated that "[a]n essential element is that the defendant must have acted with a criminal intent — he must have believed that what he swore to was false, and he must have had the intent to deceive. If there was a lack of consciousness of the nature of the statement made or it was inadvertently made or there was a mistake of the import, there was no corrupt motive." *Id.* at 622-23. All essential elements of a crime must be alleged in an indictment. FED. R. CRIM. PRO. 7(c)(1) (1976); see also *United States v. Baker*, 262 F. Supp. 657 (D.D.C. 1966).

<sup>74</sup> *United States v. Edwards*, 43 F. 67 (C.C.S.D. Ala. 1890).

<sup>75</sup> *United States v. Howard*, 132 F. 325, 350-51 (W.D. Tenn. 1904).

corruption need not be willful,<sup>76</sup> more recent cases have held that a corrupt motive must include willfulness.<sup>77</sup> Thus, an element of *scienter*, consciously breaking the law, is required.<sup>78</sup>

The domestic federal bribery statute<sup>79</sup> uses the modifier "corruptly" in a manner similar to the FCPA, co-evasively without providing a statutory definition. Under the domestic bribery law, corrupt intent must be alleged<sup>80</sup> and proven.<sup>81</sup> Cases show that a "corrupt" intent in domestic bribery indicates a greater degree of purpose than mere willful intent. The Court of Appeals for the District of Columbia Circuit has implied that to take a payment "corruptly" bespeaks a higher degree of criminal knowledge and purpose than does the mere illegal and improper discharge of official duty.<sup>82</sup> In another case,<sup>83</sup> the Court of Appeals for the Ninth Circuit defined a "corrupt act" as one "done voluntarily and intentionally, and with the bad purpose of accomplishing either an unlawful end or result by some unlawful method or means."<sup>84</sup> Both circuits, therefore, are in agreement that a corrupt act must be done with the knowledge that it is illegal. The Ninth Circuit felt that proof of "specific intent" to knowingly violate the law was required.<sup>85</sup> Furthermore, a hope or expectation

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<sup>76</sup> *Id.*; *Holmgren v. United States*, 156 F. 439, 444-45 (9th Cir. 1907); *United States v. Edwards*, 43 F. 67 (C.C.S.D. Ala. 1890).

<sup>77</sup> *United States v. Rose*, 215 F.2d 617, 622-23 (3rd Cir. 1954); *Link v. United States*, 2 F.2d 709 (6th Cir. 1924).

<sup>78</sup> *United States v. Rose*, 215 F.2d 617, 622-23 (3rd Cir. 1954).

<sup>79</sup> 18 U.S.C. § 201 (1976). The House Report on H.R. 3815 strongly suggested that the courts look to this statute in defining "corruptly." HOUSE REPORT, *supra* note 55, at 8.

<sup>80</sup> *Razete v. United States*, 199 F.2d 44 (6th Cir.), *cert. denied*, 344 U.S. 904 (1952).

<sup>81</sup> *United States v. Strand*, 574 F.2d 993 (9th Cir. 1978); *United States v. Evans*, 572 F.2d 455, 480-81 (5th Cir. 1978); *E. DEVITT & C. BLACKMAR*, *supra* note 59, at § 34.05.

In *United States v. Miller*, 340 F.2d 421 (4th Cir. 1965), the court affirmed a government supplier's conviction of violating 18 U.S.C. § 201, even though the trial judge refused a jury instruction that the money must have been given to a government employee with corrupt or fraudulent intent. The court held that the statute explicitly stated that an intention by the payor either to influence official behavior or to induce a breach of duty made the breacher culpable and that the additional common law caveat that the payor act with a "corrupt or fraudulent state of mind" was not a statutory requirement. *Id.*, at 425. This case, however, is inapposite to the FCPA because a corrupt state of mind was not an *explicit* statutory requirement prior to 1962, and the incident in *Miller* predated that enactment.

<sup>82</sup> *United States v. Brewster*, 506 F.2d 62, 71 (D.C. Cir. 1974). The latter standard is from the improper gratuity section of 18 U.S.C. § 201. See note 85 *infra*. The court discussed the district court's definition of "corruptly" as "[acting] voluntarily and with a bad or evil purpose to accomplish an unlawful result." 506 F.2d at 80-82.

<sup>83</sup> *United States v. Strand*, 574 F.2d 993 (9th Cir. 1978).

<sup>84</sup> *Id.* at 996.

<sup>85</sup> *Id.* Some cases might have been tried under the domestic bribery law, 18 U.S.C. § 201(a)-(e) (1976), were instead prosecuted under the "improper gratuity" section, § 201(f)-(h) (1976), because the latter sections do not require a corrupt purpose. Because they require a lesser intent, however, these sections carry a reduced penalty. See *United States*



of *financial gain*, either for the actor or another, is normally required.<sup>86</sup>

In light of these cases, the term "corruptly" in the FCPA illuminates the level and extent of criminal intent required for a violation. Neither perjury nor domestic bribery cases have ever faced the issue of which nation's laws must be knowingly violated, or whether an evil motive in the United States is the same as in all other countries. Although there is little case law to help weigh the intent, a high degree of culpability, including knowledge by the payor that the payment is unlawful, is unfailingly required.<sup>87</sup>

Prior to 1961, the draftsmen of the Model Penal Code included a corruption requirement in their model bribery statute.<sup>88</sup> Dissatisfaction with the vagueness of the term caused the draftsmen to change the model statute to a "pecuniary benefit" standard, but not before the Reporter prepared a new conceptual definition of "corruptly." Louis B. Schwartz defined "corruptly" as meaning an "intent to secure an improper advantage or to introduce an improper consideration in determinations made by a public servant or other person sought to be influenced."<sup>89</sup> Here again, the central harm of corruption is the intentional distortion of the public decision-making process.

2. *A proposed definition of "corruptly"* — Courts must create a standard for determining what undermines the integrity of a decision-making process. Some methods of influencing decisions are legitimate; only those involving an illegal method may be labelled "corrupt." Often, that method involves applying personally oriented pressure on the decision-maker so that he or she will disregard the criteria that should properly be used.<sup>90</sup> Since no definition of "corruptly" is given in the Act, a court should interpret "corruptly" in light of the multinational, multicultural environment of the FCPA. Even though the FCPA prohibits only those payments made through interstate commerce, the goal is

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v. Raborn, 575 F.2d 688, 691 (9th Cir. 1978); *United States v. Brewster*, 506 F.2d 62, 80 (D.C. Cir. 1974).

<sup>86</sup> E. DEVITT & C. BLACKMAR, *supra* note 59, at § 34.08.

<sup>87</sup> The federal law which governs political contributions to United States government officials or parties requires a contribution to be "knowingly" made, not "corruptly" made. Federal Election Campaign Act of 1971, 2 U.S.C. § 441(j) (1976). Since Congress uses the two modifiers for intent covering a similar activity and since corrupt intent requires an "evil" motive, "corruptly" seems to denote a higher level of intent than "knowingly."

<sup>88</sup> See MODEL PENAL CODE § 240.1, Status of Section (Proposed Official Draft 1962).

<sup>89</sup> This definition is excerpted from CONFIDENTIAL COUNCIL DRAFT No. 30, p. 82, October 21, 1961, and is reprinted with special permission of the American Law Institute.

<sup>90</sup> This approach is in accord with *United States v. Dansker*, 537 F.2d 40, 43 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). See notes 64-68 and accompanying text *supra*.

clearly to prevent corruption abroad.<sup>91</sup> Therefore, a relative definition of "corruptly" is needed, one which is more explicit than the perjorative "evil" and which can be applied to a myriad of legal and social systems.

Concepts of corruption vary from nation to nation.<sup>92</sup> The meaning changes depending on the context and social group in law, political science, sociology, religion or economics.<sup>93</sup> A corrupt practice has been categorized by the United Nations as "a special type of process or technique for influencing decision-making."<sup>94</sup> This United Nations interpretation as well as that of the Reporter for the Mode Penal Code should be applied to the FCPA to reach a definition which is flexible enough to be applied to different decision-making systems.

The word "corruptly" should be interpreted primarily with respect to the laws of the nation which the payment was intended to affect. Under American law, corrupt intent requires harm to the integrity of the decision-making process,<sup>95</sup> an issuer's knowledge that the payment is unlawful,<sup>96</sup> an evil purpose,<sup>97</sup> and an attitude showing willful disregard of the law.<sup>98</sup> That law which

<sup>91</sup> 123 CONG. REC. S19,399 (daily ed. Dec. 6, 1977) (remarks of Senators Proxmire, Brooke, and Williams).

<sup>92</sup> See McLaughlin, *The Criminalization of Questionable Foreign Payments by Corporations: A Comparative Legal Systems Analysis*, 46 FORDHAM L. REV. 1071 (1978).

<sup>93</sup> Scholars have distinguished between "conventional" and "functional" corruption.

In applying these distinctions, we bear in mind the difference between *conventional* and *functional* definitions. The former exist in the usage of a particular social context, such as the United States at a given period. Functional distinctions are made for scholarly and scientific purposes; ultimately they have in view all social contexts and hence define terms for comparative analysis.

A. ROGOW AND H. LASSWELL, *Power, Corruption and Rectitude* 132-134 (1963), reprinted in POLITICAL CORRUPTION 54 (Heidenheimer, ed. 1970).

Previous bribery statutes, such as 18 U.S.C. § 201 (1976), have implicitly dealt with bribery in a "conventional" manner, since only the American government and American morality were involved. The advent of the FCPA requires a "functional" approach due to the multi-governmental effect.

<sup>94</sup> 61 UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL, *Report of the Secretary-General*, U.N. Doc. No. E/5838, 6, ¶ 16 (1976) [hereinafter cited as U.N.E.S.C. Doc. E/5838].

The U.N. Report further explains that, "[W]hat distinguishes [a corrupt practice] from other influencing processes or techniques is the method by which the influence is effected. Every society accepts and legitimizes certain methods in the pursuit of individual interests and condemns others, ethically or legally. Duress, fraud and corruption belong to that latter category." *Id.* Thus, corrupt methods are those which are condemned by the society sought to be influenced. That society has the right to set its own standards.

<sup>95</sup> *United States v. Dansker*, 537 F.2d 40, 49 (3d Cir. 1976); *United States v. Barash*, 365 F.2d 395, 401-02 (2d Cir. 1966); *United States v. Bowles*, 183 F. Supp. 237, 248-49 (D. Me. 1958).

<sup>96</sup> *United States v. Strand*, 574 F.2d 993, 996 (9th Cir. 1978); *United States v. Brewster*, 506 F.2d 62, 82 (D.C. Cir. 1974).

<sup>97</sup> See note 60, *supra*.

<sup>98</sup> *United States v. Rose*, 215 F.2d 617, 622-23 (3d Cir. 1954); *Link v. United States*, 2 F.2d 709 (6th Cir. 1924).

must be disregarded may be either substantive proscriptions of the FCPA alone or the FCPA together with local law.<sup>99</sup> The multinational context of the FCPA, however, mandates that "corruptly" should mean *knowingly and willfully intending to influence a foreign nation's decision-making through a payment forbidden by that nation's laws*.

While some foreign courts presume that a bribe willingly paid was corrupt,<sup>100</sup> this policy conflicts with American precedent under the domestic federal bribery statute.<sup>101</sup> The prosecutor should be required to show (1) that the defendant believed the payment was illegal, (2) that the payment was not extorted from him,<sup>102</sup> and (3) that the laws of the government meant to be influenced by the payment did not countenance such a payment. This standard for "corruption" will lead to a just application of the FCPA without subverting the congressional goals of preventing American corporations from corrupting another nation's government.<sup>103</sup>

A relative definition of corruption will balance the major goals of Congress in passing the FCPA. First, the definition will prevent American corporations from offending foreign nations by violating their laws. If a foreign nation has declared a payment to be illegal and the payment is otherwise proscribed by the Act, then that payment will be illegal under American law as well. If the foreign nation, however, either favors these payments or is so unconcerned as not to proscribe them, then that nation is in no position to claim that the corporation has acted dishonestly. This interpretation would prevent the United States from being embarrassed in the world press, since any payment which offends the bribe-target nation's laws would be deterred or punished by the United States as well.

Another major congressional goal was to avoid crippling Ameri-

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<sup>99</sup> Foreign governments may advise the United States federal courts of their laws by filing an *amicus curiae* brief. 17 *Int'l Legal Materials* 1320 (1978).

<sup>100</sup> For example, Tanzania, pursuant to its Prevention of Corruption Ordinance, presumes a corrupt motive when a public officer is charged with corruptly accepting a consideration as an inducement or reward for doing something in relation to a payor's affairs once the acceptance of consideration is proven. U.N. ESCOR Doc. No. E/5838, *supra* note 94.

<sup>101</sup> See *United States v. Strand*, 574 F.2d 993, 996 (9th Cir. 1978) (corrupt intent must be proven beyond a reasonable doubt); *United States v. Barclay*, 560 F.2d 812, 816-17 (7th Cir. 1977) (articulation of specific intent required in jury instructions); *Baker v. United States*, 310 F.2d 924, 930-31 (9th Cir. 1962) (jury may not infer specific intent from an isolated fact).

<sup>102</sup> SENATE REPORT, *supra* note 10, at 11. See U.S. Dept. of Justice, *Antitrust Guide for International Operations Case L*, reprinted in [1977] ANTI-TRUST & TRADE REG. REP. (BNA) E-15 to E-16; McLaughlin, *supra* note 92, at 1105-09.

<sup>103</sup> SENATE REPORT, *supra* note 10, at 4, 10.

can business any more than necessary to prevent corruption. This congressional purpose is exhibited by the distinction between ministerial and discretionary officials, the business purpose limitation, and, most of all, the corruption requirement. The purpose of including the modifier "corruptly" was to limit application of the Act to cases only where the payor had "an intent to *wrongfully* influence" the official.<sup>104</sup>

If the payment is a normal, legal transaction in the setting where made, then it can be neither "wrongful" nor "corrupt." The purpose of this Act is to avoid antagonizing foreign governments, not to cripple American trade. Any uniform definition of "corruptly" would have the latter result, preventing Americans from trading on the basis of the local laws.

A relative interpretation of "corruptly" will not lead to widespread abuse, since the type of payments described by the FCPA are illegal in most other nations.<sup>105</sup> Furthermore, there will not be distortions of trade from illegal acts; all companies dealing with that nation would be on an equal footing. The American business community's reputation for honesty will not suffer since any illegal payment would be outlawed in both the bribe-target nation

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<sup>104</sup> American courts must examine the bribe-target nation's laws to determine, as a matter of law, if the influence was "wrongful." Although condensing or generalizing the world's bribery and anti-corruption laws is beyond the scope of this note, some principles recur.

Many common law nations require some valuable consideration to induce a decision. See, e.g., GHANA CRIMINAL CODE, Act 29 § 240 (1960). In French law a distinction is made between "passive corruption," (the payee requests the bribe) and "active corruption," (the payor initiates the transaction). Furthermore CODE PENAL Art. 175-1 (1960) provides that all public officials shall be subject to criminal sanctions for activities of a nature that compromise their independence in relation to those enterprises under their control, administration, or service. Thus, a French public official commits corruption even if the act was beyond the scope of the employment of the official so long as the act was facilitated by his duties or position. See also CODE PENAL Art. 177 (1960).

The Soviet Union prohibits the taking of a bribe, giving of a bribe, acting as an intermediary of a bribe, and bribery to obstruct a citizen's exercising the right to vote. Berman, SOVIET CRIMINAL LAW AND PROCEDURES, Articles 173, 174, 174-1, 189, 190, 132 (1972). In the Soviet Union taking a bribe is punishable by death. An act or omission to act is not a crime if, because of its insignificance, it does not represent a social danger. *Id.*, at Art. 7.

Other nations use different concepts and approaches for preventing corruption. Some of the world's bribery statutes include: Barbados, Art. 3, ¶ 1 of the Prevention of Corruption and the Election Offenses and Controversies Act; Brazil, PENAL CODE Art. 317 (1969); Federal Republic of Germany, Art. 359, BÜRGERLICHES GESETZBUCH (BGB) and "Rules of Behavior of Members of the German Bundestag," made effective Nov. 1, 197 (1976 Bundesgesetzblatt I 2065-2066); India, Report of the Committee on the Prevention of Corruption, published by the Government of India, Ministry of Home Affairs, New Delhi, 1964; Japan, CRIMINAL STATUTES OF JAPAN, Arts. 197-198 (1968); Mexico, PENAL CODE Arts. 217, 218 (1964); Sweden, BROTTSBALKEN (Penal Code) Ch. 20, secs. 1 and 2, (1972); and Tanzania, Prevention of Corruption Ordinance Act 1970, No. 1.

<sup>105</sup> *Abuses of Corporate Power*, *supra* note 22, at 156 (statement of Chairman Proxmire); *Foreign and Corporate Bribes*, *supra* note 18, at 18 (statement of Ralph Nader).

and the United States.

One possible objection to a relative definition of "corruptly" may be made on due process grounds. A defendant may claim that the FCPA does not give adequate warning of the conduct proscribed.<sup>106</sup> This argument is unpersuasive for three reasons. First, the statute requires that the defendant must authorize the proscribed payments in order to be convicted. This factor alone provides fair warning.<sup>107</sup> Second, the defendant is not liable under the FCPA for any conduct proscribed by a foreign nation but not by the FCPA. Any ambiguities, such as the term "corruptly" should be strictly construed against the prosecution and in favor of the defendant.<sup>108</sup> This construction favors a relative definition for corruption. A defendant may have believed that "corruptly" referred to laws of the government being corrupted. In this situation, a uniform, domestically-oriented definition of "corruptly" could constitute a denial of fair warning. Third, if a defendant has made a bribe in a foreign nation, he should be charged with knowledge of that nation's laws.<sup>109</sup> Therefore, the relative definition of "corruptly" not only provides due process, but it is desirable in the interests of treating individual cases justly.<sup>110</sup>

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<sup>106</sup> A situation analogous to the FCPA exists when Congress defines a federal crime by reference to a state statute. See, e.g., the Travel Act, 18 U.S.C. § 1952 (1976) (upheld in *United States v. Schwartz*, 398 F.2d 464, 467 (1968), cert. denied, 393 U.S. 1049 (1969)), and the Assimilative Crimes Act, 18 U.S.C. § 13 (1976) (upheld in *United States v. Sharpnack*, 355 U.S. 286 (1958)). In *Sharpnack*, the Court reasoned that since Congress had the power to adopt a uniform criminal code and since Congress could do so by copying from state legislation, Congress could assimilate state laws by reference. *Id.* at 293.

<sup>107</sup> There is no need for a person to guess at which conduct is proscribed under the FCPA; the conduct is clearly delineated. Any uncertainty which is involved goes to the level of intent required. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."); cf. *Smith v. Goguen*, 415 U.S. 566 (1974) (a prohibition against treating the flag "contemptuously" held unconstitutionally vague).

<sup>108</sup> *United States v. Chappell*, 292 F. Supp. 494 (C.D. Cal. 1968).

<sup>109</sup> Cf. *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974) (defendant does not need to know of foreign theft statute to know that the object was stolen).

<sup>110</sup> A further objection to a relative definition of "corruptly" may be made on equal protection grounds. Since all defendants who are being tried under the FCPA are being tried under American law, it may be asserted that no distinction should be made because the payment occurred in Honduras rather than in Japan.

This argument has been rejected by the courts in the context of state laws being relied upon to create federal liability. *United States v. Morrison*, 531 F.2d 1089, 1093 (1st Cir.) cert. denied 429 U.S. 837 (1976); *Turf Center, Inc. v. United States*, 325 F.2d 793, 795-96 (9th Cir. 1963); *Spinelli v. United States*, 382 F.2d 871, 890 (8th Cir. 1967) *rev'd on other grounds*, 393 U.S. 410 (1969). There is no reason to believe that if reliance upon different state laws does not offend equal protection, differences among nations will so offend equal protection. "[E]qual protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamen-

### E. Foreign Officials

Both issuer and domestic concerns provisions of the FCPA specify that bribes are prohibited only when made to certain foreign government officials, foreign political parties, officials of foreign political parties or any other person while knowing, or having reason to know, that the compensation will be passed on to a foreign government official, political party or official of a party.<sup>111</sup> There is no reason to believe that the government influenced must be the official's own government. The FCPA's definition of a foreign government official<sup>112</sup> specifically excludes anyone whose duties are "essentially ministerial or clerical." Thus, bribes made as "grease money" to expedite a bureaucratic, clerical activity are legal,<sup>113</sup> while bribing a person with discretionary powers is illegal, even if the action paid for is essentially ministerial.

This distinction was a major source of concern throughout the hearings, since prohibiting all payments would unnecessarily cripple American commercial activities abroad.<sup>114</sup> Expediting or "grease" payments are made to insure promptness or reliability in the foreign official's job performance and would include such diverse payments as expediting shipments, placing a transoceanic telephone call, securing required permits, or obtaining adequate police protection.<sup>115</sup> There is no dollar limitation on grease money.<sup>116</sup>

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tal right or operates to the peculiar disadvantage of a suspect class." *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976); *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973). Bribery is not a fundamental right, nor do payors constitute a suspect class.

Even if a court recognized a relative definition as a purely judge-made classification, the classification would not violate equal protection. Discrimination in enforcement of a statute is not invidious unless deliberately based upon an unjustifiable classification, such as race or religion. *United States v. Hercules, Inc.*, 335 F. Supp. 102, 104 (D. Kan. 1971).

<sup>111</sup> 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (Supp. I 1977).

<sup>112</sup> Section 103(a) defines "foreign official" as

any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of such government or department, agency or instrumentality. Such term *does not include* any employee of a foreign government or any department, agency, or instrumentality thereof whose duties are essentially ministerial or clerical.

15 U.S.C. §§ 78dd-1(b), 78dd-2(d)(2) (Supp. I 1977) (emphasis added).

<sup>113</sup> SENATE REPORT, *supra* note 10, at 10.

<sup>114</sup> See 123 CONG. REC. H12825-26 (daily ed. Dec. 7, 1977).

<sup>115</sup> SENATE REPORT, *supra* note 10, at 10.

<sup>116</sup> *But see* 347 TRADE REG. REP. (CCH) 7 (8/21/78). The Federal Trade Commission has placed a \$1,000 limit on payments which can be made by the Lockheed Corp. This limit appears to define the F.T.C.'s toleration of grease money payments.

The distinction between ministerial and discretionary officials is vague. Since no reliable definition is provided by either the FCPA or its legislative history, presumably the accepted American definitions should apply.<sup>117</sup> A ministerial officer is an official who has no power to pass judgment on the matter to be done, and usually must obey a superior.<sup>118</sup> Whether one is a ministerial officer depends on the general nature and scope of his duties and not whether a *particular* act involves judgment or discretion.<sup>119</sup> If the officer is expected to ascertain facts, but upon ascertaining the facts has an absolute, imperative duty, his work is ministerial.<sup>120</sup> Discretionary duties require the exercise of reason in the adaptation of means to an end, and a choice in determining the course to be pursued.

A foreign official is defined in the FCPA as an official employed by a foreign government, department, agency or instrumentality. No distinction is made between foreign officials engaged in proprietary functions and those performing governmental functions. While general commercial bribery is not covered by the Act, bribing a foreign official of a state industry or enterprise is covered.<sup>121</sup> An "agency or instrumentality" is not defined by the FCPA, but a convenient definition is found in the Foreign Sovereign Immunities Act.<sup>122</sup> This definition includes state-run enterprises.

The FCPA forbids payments to foreign political parties and candidates for public office which are made with the intention of influencing a governmental decision by that person.<sup>123</sup> The pay-

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<sup>117</sup> The domestic bribery laws (18 U.S.C. § 201 (1976)) do not make an equivalent distinction; rather the distinctions are linked to the level of criminal intent. See *United States v. Brewster*, 506 F.2d 62, 72 (D.C. Cir. 1974).

<sup>118</sup> 63 AM. JUR. 2d *Public Officers and Employees* § 28 (1972).

<sup>119</sup> *Id.*; See *People v. Fowler*, 14 Ill. 2d 252, 260 (1958); *People v. Montana*, 380 Ill. 596, 606 (1942) (parole board as an "administrative" body); *People v. Joyce*, 246 Ill. 124, 92 N.E. 607 (1910).

<sup>120</sup> 63 AM. JUR. 2d *Public Officers and Employees* § 273 (1972).

<sup>121</sup> 15 U.S.C. §§ 78dd-1(b), 78dd-2(d)(2) (Supp. I 1977) ("instrumentality").

<sup>122</sup> An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(b) (1978).

Congress created this definition in 1976 to classify which foreign entities are a part of a foreign government and therefore entitled to sovereign immunity. H.R. REP. NO. 94-1487, 94th Cong., 2d Sess. (1976) at 15, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6604, 6614. Since the FCPA is also concerned with determining which entities are a part of a foreign government, this definition should be applied.

<sup>123</sup> 15 U.S.C. §§ 78dd-1(a)(1)(B), (2)(B), (3)(B), 78dd-2(a) (1)(B), (2)(B), (3)(B) (Supp. I 1977).

ments, however, must have a business purpose to be proscribed.<sup>124</sup> A political contribution made by an issuer or a connected person which is not intended to influence the official in obtaining or retaining business with that issuer is not proscribed.<sup>125</sup>

The ban on political contributions could be challenged as an unconstitutional limitation upon the corporation's First Amendment rights. However, because the FCPA prohibits only corporate contributions made for corrupt purposes, the Act will probably survive such an attack. The Federal Corrupt Practices Act<sup>126</sup> prohibiting corporate political contributions to individuals or parties has been upheld, partly because the overriding concern behind that act's passage was the need to suppress corruption, a legitimate legislative goal.<sup>127</sup> The corruption requirement distinguishes the FCPA from the Massachusetts statute<sup>128</sup> struck down in *First National Bank v. Bellotti*,<sup>129</sup> which prohibited corporate contributions or expenditures in public referenda as well as in partisan elections. The Supreme Court, in *Bellotti*, found that

a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office. Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditure, by corporations to influence candidate elections.<sup>130</sup>

The FCPA does not infringe on the right of a corporation to advertise or expend money with regard to political elections, except that they may not be made to partisan groups in order to secure business advantages from that group. The FCPA should withstand any constitutional challenge on these grounds.<sup>131</sup>

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<sup>124</sup> See notes 136-39 and accompanying text *infra*.

<sup>125</sup> 15 U.S.C. §§ 78dd-1(a), 78dd-2(a)(Supp. I 1977).

<sup>126</sup> 2 U.S.C. § 441b (Supp. I 1977).

<sup>127</sup> *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n. 26 (1978); *Buckley v. Valeo*, 424 U.S. 1 (1976); *United States v. United Auto Workers*, 352 U.S. 567, 570-75 (1957).

<sup>128</sup> MASS. ANN. LAWS ch. 55, § 8 (Michie/Law Co-op 1978).

<sup>129</sup> 435 U.S. 765 (1978).

<sup>130</sup> *Id.* at 788 n. 26.

<sup>131</sup> In an analogous situation, the military may restrict the First Amendment rights of American servicemen abroad. This is in part due to the special role as political representative that the military plays while stationed abroad. The United States government may limit the political activities of servicemen both here and abroad. *Culver v. Secretary of the Air Force*, 559 F.2d 622, 628 (D.C. Cir. 1977); see generally *Parker v. Levy*, 417 U.S. 733, 758-59 (1974). American-based multinational corporations also have political characteristics in their international dealings which may support a congressional policy of limiting their involvement in foreign politics.



The FCPA deals particularly with corporate payments to a foreign local agent with the understanding that the agent will pass on part of the fee to government officials.<sup>132</sup> All that is required is that the payor know or have reason to know that all or a portion of the payment will flow either directly or indirectly to one of the forbidden parties or officials.<sup>133</sup> The defendant must have passed the money to an agent with the corrupt purpose of having that money distributed to one of the forbidden officials.<sup>134</sup> The phrase "having reason to know," when read in conjunction with "corruptly" should be interpreted as meaning that the agent need not explicitly inform the defendant that the money would be passed on, so long as the defendant understood or expected that the agent would do so.<sup>135</sup> The phrase thereby prevents a payor from escaping liability by not explicitly instructing the agent that a bribe was to be paid.

### F. *The Business Purpose Limitation*

The Senate bill placed a final limitation in both the issuer and domestic concerns sections requiring that the motive behind the forbidden activities be to "assist such issuer in obtaining or retaining business for or with, or directing business to, any person, or influencing legislation or regulations of that government or instrumentality."<sup>136</sup>

The final Act, however, forbids only those payments made in order to assist an issuer in *obtaining or retaining business*, for or with, or *directing* business to, any person. This was a significant change from the limitations in the Senate bill, "directing business or influencing legislation," and from the equivalent provision in the House bill, "to affect or influence any act or decision of such government or instrumentality."<sup>137</sup>

<sup>132</sup> 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3) (Supp. I 1977); SENATE REPORT, *supra* note 10, at 10.

<sup>133</sup> 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3) (Supp. I 1977). The "having reason to know" standard could conceivably create a violation of due process, since the standard of "had reason to know" is unusually loose for criminal liability. See *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964). Unquestionably, the circumstances surrounding the payment will be decisive. See *United States v. Mazurie*, 419 U.S. 544 (1975).

<sup>134</sup> 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3) (Supp. I 1977).

<sup>135</sup> But see *Williams v. North Carolina*, 325 U.S. 226 (1944); *United States v. Blaint*, 258 U.S. 250 (1922) (punishment of a crime when person was ignorant of the facts making the act a crime does not violate due process).

<sup>136</sup> 123 CONG. REC. S7198 (daily ed. May 5, 1977) (emphasis added); SENATE REPORT, *supra* note 10, at 10.

<sup>137</sup> 123 CONG. REC. S7198 (daily ed. May 5, 1977), H11,932 (daily ed. Nov. 1, 1977). The Conference Report states that S. 305 also prohibited "divert[ing] a business opportunity from any person," but such language was not in S. 305, unless by implication. See

A mere change in the foreign nation's laws is not sufficient to show a violation of the FCPA; the change must also affect a person's (not necessarily the issuer's) business standing.<sup>138</sup> While the phrase "obtaining or retaining business" would cover a contract between the payor and the bribe-target nation, or payments of protection money to allow continued commerce, it would not cover other important situations. Incredibly, this section fails to encompass a traditional and widespread type of bribery: the buying of favorable regulation or legislation.<sup>139</sup> The reason for this omission is unclear; the Conference Report gives no indication of congressional intent. The only explanation for the omission is that Congress wished to avoid any infringement on American activities which did not relate to obtaining business.

### G. Enforcement Responsibilities

The legislative history of the FCPA envisioned that the SEC would continue in its role as investigator of foreign bribes.<sup>140</sup> The SEC has two available remedies: civil injunction<sup>141</sup> and suspension of an attorney's or accountant's right to practice before the SEC.<sup>142</sup> The Justice Department will prosecute any criminal violations.<sup>143</sup> Once the SEC has compiled enough evidence for a criminal action, the case shall be referred to the Justice Department for criminal prosecution.<sup>144</sup>

One word of caution must be voiced to the attorney already familiar with the Securities Exchange Act of 1934 and the general securities disclosure scheme. The FCPA does not rectify any existing inadequacies in the disclosure scheme. The FCPA may punish a miscreant corporation yet still not provide helpful information to the investors of that corporation.<sup>145</sup> The traditional

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CONFERENCE REPORT, *supra* note 33, at 12. The exclusion of this clause from the final Act should not be taken as a clear signal that Congress did not want to extend coverage to include bribes involved in unfair trading practices, but the fact that the conferees considered and disregarded such language does imply that they are not prohibited.

<sup>138</sup> 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (Supp. I 1977).

<sup>139</sup> The FCPA does not proscribe bribes such as were paid by United Brands in Honduras for tax advantages. *See* note 17 *supra*.

<sup>140</sup> SENATE REPORT, *supra* note 10, at 11.

<sup>141</sup> SENATE REPORT, *supra* note 10, at 12; *see also* Paige Airways, Inc., No. 78-0656 ¶ 96,393; SEC v. Int'l Systems Control Corp., [1979] 838 FED. SEC. L. REP. (CCH) 7-8 (D.D.C. Dec. 27, 1979).

<sup>142</sup> SENATE REPORT, *supra* note 10, at 12; 17 C.F.R. § 201.2(e)(1979).

<sup>143</sup> The Justice Department will review corporations on a case-by-case basis to determine if prosecution is warranted. *See* 28 C.F.R. § 50.17, *reprinted in* 522 SEC. REG. & L. REP. (BNA) J-1 (Oct. 3, 1979). *See also* note 175 *infra* for a discussion of criminal penalties.

<sup>144</sup> SENATE REPORT, *supra* note 10, at 11-12.

<sup>145</sup> Revealed information could lead to a conviction under the FCPA which may result in a million dollar fine for the corporation. 15 U.S.C. § 78ff (Supp. I 1977). The corpora-

congressional policy of protecting investors through disclosure is unaided by the criminalization of these payments. The FCPA may aid investors by deterring some illegal corporate payments, but this could have been achieved equally well by including the FCPA within the domestic bribery statute.<sup>146</sup> The accounting provisions which purport to be the enforcement mechanism under the Act do not require *any* new disclosure.<sup>147</sup> These provisions merely require a standard of tight management control of corporate expenditures. Internal controls in the form of recordation and authorization standards were included in the FCPA under the rubric of improving disclosure, yet a failure to disclose material information is a violation of the Securities Exchange Act even without strong management control.

Congress enacted mandatory minimum accounting standards under the guise of enforcing the criminalization provisions.<sup>148</sup> These standards codify generally accepted auditing practices

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tion's business prospects in the country which was bribed would be jeopardized. Few, if any, investors would desire such a punishment, no matter how rampant their corporation's corruption.

<sup>146</sup> The domestic bribery statute is the Corrupt Practices Act, codified at 18 U.S.C. § 201 (1978).

<sup>147</sup> The illegality of a payment alone does not make that payment "material" and thus subject to disclosure pursuant to the Securities Exchange Act. See notes 159-67 and accompanying text *infra*.

<sup>148</sup> "The purpose of [the accounting provisions] is to strengthen the accuracy of the corporate books and records and the reliability of the audit process which constitutes the foundations of our system of corporate disclosure." SENATE REPORT, *supra* note 10, at 7. The accounting provisions "are intended to operate in tandem with the criminalization provisions . . . to deter corporate bribery." *Id.* These accounting standards are to, devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—

(i) transactions are executed in accordance with management's general or specific authorization;

(ii) transactions are recorded as necessary (1) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (2) to maintain accountability for assets;

(iii) access to assets is permitted only in accordance with management's general or specific authorization; and

(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

15 U.S.C. § 78m (Supp. I 1977). See also SEC Accounting Series Release No. 242 (Feb. 16, 1978), reprinted in 14 SEC Docket 180 (Feb. 28, 1978).

The tangential relationship of the accounting standards and the rest of the FCPA is indicated in the SEC's new rules adopted pursuant to the accounting standards, Regulation 13B-2, "Maintenance of Records and Preparation of Required Reports," 44 Fed. Reg. 10,964 (1979), (to be codified in 17 C.F.R. § 240.13b2) [hereinafter cited as Regulation 13B-2]. The SEC admits that these rules are "intended to deal with a much broader range of practices than the problem of questionable payments. . . ." *Id.*

advocated by the SEC<sup>149</sup> and the American Institute of Certified Public Accountants.<sup>150</sup> The essence of the four standards is that expenditures be made only with the management's approval, and that they be properly recorded. Congress felt that these standards "will go a long way to prevent the use of corporate assets for corrupt purposes. . . [and that] public confidence in securities markets will be enhanced by assurance that corporate record keeping is honest."<sup>151</sup>

The goal of these provisions is corporate accountability.<sup>152</sup> The mandatory minimum standards cover the same securities issuers as does the securities issuer section<sup>153</sup>—those who are required to register pursuant to section 12 and those who are required to file reports pursuant to section 15(d)<sup>154</sup> of the Securities Exchange Act of 1934. The SEC asserts that the accounting standards and an SEC regulation<sup>155</sup> are designed to help implement the basic goals of the 1934 Act, though, as previously discussed, this article disagrees with the SEC's assertion. To be sure, the disclosure regime is threatened by the use of slush funds and off-the-books transactions.<sup>156</sup> Unfortunately, the goal of disclosure is not supported by making the payments illegal.<sup>157</sup> While many firms will be less likely to pass bribes in the future, those which do will avoid using regular corporate channels so as to evade the auditor. Therefore,

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<sup>149</sup> SEC Exchange Act Release No. 13185 (Jan. 19, 1977), reprinted in [1976-77] FED. SEC. L. REP. (CCH) ¶ 80,896.

<sup>150</sup> The Act attempts to codify existing concepts and practices advocated by many accountants. The wording of the Act is taken in part from § 320.28 of the Statement on Auditing Standards No. 2, Codification of Auditing Standards and Procedures. SENATE REPORT, *supra* note 10, at 8. See Cook & Kelly, *Internal Accounting Control: A Matter of Law*, 147 J. ACCOUNTANCY 58 (Jan. 1979) [hereinafter cited as Cook & Kelly]. See also Atheson, *The Foreign Corrupt Practices Act of 1977: An International Application of SEC's Corporate Governance Programs*, 13 INT'L LAW. 703 (Fall 1978).

<sup>151</sup> SENATE REPORT, *supra* note 10, at 7.

<sup>152</sup> Regulation 13B-2, *supra* note 148, 44 Fed. Reg. at 10,966.

<sup>153</sup> See notes 33-35 and accompanying text *supra*.

<sup>154</sup> 15 U.S.C. § 78o(d) (1978).

<sup>155</sup> Regulation 13B-2, *supra* note 148, 44 Fed. Reg. at 10,966. The SEC claims that the "goal of corporate accountability" is common to the FCPA and the Exchange Act.

<sup>156</sup> Regulation 13B-2, *supra* note 148, 44 Fed. Reg. at 10,964-65.

<sup>157</sup> Some corporations may have found ways to avoid the FCPA by creating foreign subsidiaries to make payments. Any United States citizens involved in the creation of a foreign subsidiary for this purpose are probably guilty of acts done "in furtherance of" the payment. See *Activities of American Multi-National Corporations Abroad*, *supra* note 4, at 36 (statement of SEC Commissioner Phillip Loomis).

Professor Barry Richman believes payments are still being made and hidden. "Some companies have hidden the payments so well they haven't even been disclosed. . . Others are still making payments, but they've become more sophisticated. They are simply changing distribution channels and using third parties to make the payments, so that their own books are clean." Rankin, *Accounting Ruses Used in Disguising Dubious Payments*, N.Y. Times, Feb. 27, 1978, § D (Business/Finance), at 1, col. 1.

the accounting provisions by themselves by no means deter bribery.

The accounting provisions may, however, signal a new "control environment" which already has led to codes of employee conduct and the establishment of independent auditing boards.<sup>158</sup> While the accounting provisions may aid corporate responsibility, the provisions are very different in nature from the Exchange Act's disclosure scheme. The accounting standards do not require any disclosure. The standard of disclosure under the Exchange Act is "materiality."<sup>159</sup> The accounting provisions of the FCPA do not affect what is "material," nor do they use a materiality standard for recordation, although the legislative history of the accounting standards indicates that a truly insignificant transaction may be omitted from recordation.<sup>160</sup>

Through regulations, the SEC has gone far beyond the statutory authority of the FCPA's accounting standards and has mandated that, "no person shall, directly or indirectly, falsify or cause to be falsified, any book, record or account subject to the accounting standards."<sup>161</sup> This provision contains no "materiality" stan-

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<sup>158</sup> FED. SEC. L. REP. (CCH) No. 820 at 7-8 (Aug. 22, 1979); 486 SEC. REG. & L. REP. (BNA) D-2 (Jan. 17, 1979); 473 SEC. REG. & L. REP. (BNA) D-6 (Nov. 11, 1978) (statements of SEC Chairman Williams); 487 SEC. REG. & L. REP. A-17 (Jan. 24, 1979) (statement of Treasury General Counsel Robert Mundheim). Cf. A. CONARD, *supra* note 7, at 355-76.

<sup>159</sup> A. CONARD, *supra* note 7, at 303. Professor Conard defines "materiality" as a quality of information which would be "likely to affect the investment decision of the investor." *Id.* See *Mills v. Electric Auto-Lite*, 396 U.S. 375 (1970); *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968); *Kardon v. National Gypsum Co.*, 73 F. Supp. 798 (E.D. Pa. 1947).

<sup>160</sup> The Senate Report suggests that corporate management, in designing systems under the accounting standards, should take into consideration the "cost/benefit relationship of the steps to be taken in fulfillment of its responsibilities. . . ." SENATE REPORT, *supra* note 10, at 8.

S. 305 required the issuer to "devise and maintain adequate systems of internal accounting controls" which would be sufficient to provide reasonable assurances that transactions would be recorded to maintain accountability of assets. Since the precise requirements of the system of internal controls to be maintained by the issuer are set forth in specific terms in the statute, the word "adequate" was deemed superfluous and deleted in conference. CONFERENCE REPORT, *supra* note 33, at 10.

<sup>161</sup> Regulation 13B-2, Rule 13b2-1, *supra* note 148. The CONFERENCE REPORT, however, makes clear that, "the conferees intend that no inference should be drawn with respect to any rule-making authority the SEC may or may not have under the securities laws," due to the deletion of language which would have supported Rule 13b2-1. CONFERENCE REPORT, *supra* note 33, at 11.

In explaining the decision to delete these provisions from the Act, Senator Proxmire stated that

These provision is [sic] prohibited any person from 'knowingly' lying to an accountant in connection with an audit of the firm. Unfortunately these provisions became involved in an issue never intended to be raised or resolved by the Senate bill — namely, whether or not the inclusion or deletion of the work 'knowingly' would or would not affirm expand or overrule the decision of the

dard, nor does it impose the requirement of scienter for a violation.<sup>162</sup> In one of its rules the SEC has prohibited any officer or director from misleading an accountant, and although immaterial transgressions are exempted, scienter again is not required.<sup>163</sup> These rules were adopted over the objections of one Commissioner,<sup>164</sup> and were subject to substantial criticism when they were proposed.<sup>165</sup>

An auditor who suspects or has discovered a bribe or other weakness in an issuer's internal accounting controls should, in considering disclosure, act in accordance with his current professional standards.<sup>166</sup> Although an illegal act is not necessarily material, and thereby subject to disclosure, illegal payments may reflect on management's integrity with the result that failure to disclose these payments is a material *omission*. This view has been criticized on the ground that the securities laws are intended to protect investors, not society at large.<sup>167</sup> According to one commentator, savvy lawyers should not give opinions on compliance with the accounting provisions; whether a payment is material is a factual question for the auditor rather than a legal conclusion.<sup>168</sup>

Finally, the accounting standards section of the FCPA contains provisions which allow the head of any agency or department responsible for national security matters to exempt, on a limited basis, an issuer involved in an enterprise related to national security.<sup>169</sup> For any exemption, directives must be executed with specificity, must expire annually unless renewed in writing, and be

Supreme Court in the *Hochfelder* case [*Ernst & Ernst v. Hochfelder*, 325 U.S. 185 (1976)]. . . . This legislation is not the forum to debate *Hochfelder* issues.

This is legislation to proscribe foreign corporate bribery.

123 CONG. REC. S19,399 (daily ed. Dec. 6, 1977).

<sup>162</sup> 44 Fed. Reg. 10,967-68.

<sup>163</sup> *Id.* at 10,969-70.

<sup>164</sup> *Id.* at 10,970 (statement of former SEC Commissioner Karmel).

<sup>165</sup> *Id.* at 10,968-69.

<sup>166</sup> While no authoritative work has been completed to guide accountants in complying with the accounting standards, a special advisory committee of the American Institute of Certified Public Accountants has issued a tentative report giving guidelines for evaluating internal accounting control. This report was issued in Cook & Kelly, *supra* note 150. See also AICPA, Statement on Auditing Standards (SAS) 16, The Independent Auditor's Responsibility for the Detection of Errors or Irregularities (Jan. 1977), *codified in* AICPA, Statement on Auditing Standards, *supra* note 150, § 327; SAS 17, Illegal Acts by Clients (Jan. 1977), *codified in* AICPA, Statement on Auditing Standards, *supra* note 150, § 328; SAS 20, Required Communication of Material Weaknesses in Internal Accounting Control (Aug. 1977), *codified in* AICPA, Statement on Auditing Standards, *supra* note 150, § 323.

<sup>167</sup> 476 SEC. REG. & L. REP. (BNA) A-12 (Nov. 1, 1978) (statement of former SEC Commissioner Karmel).

<sup>168</sup> 487 SEC. REG. & L. REP. (BNA) A-18 (Jan. 24, 1979) (statement of former SEC Commissioner A. A. Sommer Jr.).

<sup>169</sup> 15 U.S.C. § 78m(b)(3)(A) (Supp. I 1977).

reviewed annually by the President.<sup>170</sup> The President must certify that such directives involve classified information and conform with applicable statutes and Executive Orders.<sup>171</sup> Furthermore, the section requires that a summary of all such directives be submitted annually to the appropriate congressional intelligence oversight committees.<sup>172</sup> The only matters to be excluded from the recordation requirements of the preceding paragraphs are those which would result or would be likely to result in the disclosure of information which has been classified in the interests of national security.<sup>173</sup> Even then, they may only be excluded to the extent that such information is specifically related to the person's lawful cooperation.<sup>174</sup> Due to these stringent requirements, this national security provision is unlikely to become a loophole for evasion of the Act.

#### *H. Criminal and Civil Penalties Under the Securities Issuer and Domestic Concerns Sections*<sup>175</sup>

In determining the penalty to be applied in any given case, it has been argued here that the court should examine the laws of the nation which is affected by the bribe.<sup>176</sup> If that nation's laws, customs, or mores permit payments, the social harm created by the payment is minimal and the punishment should reflect this fact.

The House Report accompanying the House bill specified that a private cause of action might be allowed under the Act for those who are injured by the bribe or its effects,<sup>177</sup> but the Conference Report made no mention of this issue.<sup>178</sup> The FCPA does not specifically mention a private action, but such an action would

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<sup>170</sup> *Id.*

<sup>171</sup> CONFERENCE REPORT, *supra* note 33, at 11; 15 U.S.C. § 78m(b)(3)(A) (Supp. I 1977).

<sup>172</sup> 15 U.S.C. § 78m(b)(3)(B) (Supp. I 1977).

<sup>173</sup> CONFERENCE REPORT, *supra* note 33, at 11.

<sup>174</sup> *Id.*

<sup>175</sup> The securities issuer provision provides that where an issuer has been found to violate the section, any employee or agent (other than an officer, director or stockholder) who is subject to United States jurisdiction and who willfully carried out the act constituting the violation shall be fined not more than \$10,000 or imprisoned for not more than five years, or both. 15 U.S.C. § 78ff (c)(3) (Supp. I 1977). Since the employee or agent has less control over the issuer, his liability should be predicated on the issuer's. 123 CONG. REC. H11,934 (daily ed. Nov. 1, 1977). The issuer is forbidden from directly or indirectly reimbursing the convicted person. 15 U.S.C. § 78ff(c)(4) (Supp. I 1977).

<sup>176</sup> Even if the courts prove unwilling to examine the laws of the bribe-target nation to determine if the payment was made corruptly, the court should punish bribes given in violation of the target nation's laws more severely than payments made pursuant to local custom and law.

<sup>177</sup> HOUSE REPORT, *supra* note 55, at 10.

<sup>178</sup> CONFERENCE REPORT, *supra* note 33.

unquestionably benefit enforcement and should be allowed.<sup>179</sup>

One other significant variation between the issuer section and the domestic concerns section is that the latter authorizes the Attorney General to obtain permanent or temporary civil injunctions to prevent violations of the section.<sup>180</sup> The Attorney General must have some reason to believe that a person or company covered by the section is engaged in, or at least is about to engage in, a violation.<sup>181</sup> The standard of proof necessary to obtain the injunction is uncertain; only a "proper" showing is required by the section.<sup>182</sup>

### III. INTERNATIONAL ACTION TO SUPPLEMENT THE FCPA

One of the major problems with the FCPA is that it affects only American-based corporations and cannot affect foreign-based

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<sup>179</sup> See Letter from Frederick B. Wade (SEC Special Counsel, Office of the General Counsel) (asserting the existence of a private cause of action), *reprinted in* [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 81,701. The House clearly intended that a private cause of action should exist. HOUSE REPORT, *supra* note 55, at 10. The Senate deliberately refrained from taking a position on this issue. 123 CONG. REC. S19,401 (daily ed. Dec. 6, 1977) (remarks of Sen. Tower).

The Supreme Court, in *Cort v. Ash*, 422 U.S. 66, 78-85 (1975), enunciated four factors to be used by the federal courts in assessing whether a private cause of action may be implied in a federal statute. First, whether the plaintiff is a member of a class for whose special benefit the statute was enacted; second, whether there is an indication of legislative intent to allow such a cause of action; third, whether it is consistent with the underlying purposes of the legislature to imply such a right; finally, whether the cause of action is one which is normally left to state law.

Under these criteria the FCPA should include an implied right of action. Any shareholder, bondholder or competitor injured by a bribe is a member of the class for whose protection Congress enacted the FCPA. SENATE REPORT, *supra* note 10, at 3-4; HOUSE REPORT, *supra* note 22, at 4-5; 123 CONG. REC. H11, 932 (daily ed. Nov. 1, 1977). See also notes 23-25 & 156 and accompanying text *supra*. The House certainly intended that such a right of action should exist. HOUSE REPORT, *supra* note 55, at 10. The Senate did not oppose it, though it did not explicitly support an action. 123 CONG. REC. S19,401 (1977). The enforcement of the Act would be improved through actions by "private attorneys-general," who would bear part of the burden of enforcement for the Justice Department. Finally, no state cause of action exists to allow redress from a violation of the FCPA. Therefore, a private cause of action is a constructive method of enforcing the Act and so should be allowed by the courts. See also *J.I. Case Co. v. Borak*, 377 U.S. 426 (1963) (first recognition by Supreme Court of an implied right of action under the securities laws); 466 SEC. REG. & L. REP. (BNA) A-7 (Aug., 16, 1978).

<sup>180</sup> 15 U.S.C. § 78dd-2(c) (Supp. I 1977).

<sup>181</sup> *Id.*

<sup>182</sup> The critical question as to the propriety of the injunction is whether there is a reasonable likelihood of future violations. Among the factors relevant to determining such likelihood are: (1) the existence and nature of the past violations, (2) whether defendants admit past guilt or maintain their past conduct was blameless, (3) whether the defendants ceased their actions voluntarily or only upon the filing of a complaint, and (4) the sincerity of defendants' assurances that they will not violate the FCPA in the future. SEC v. Pennsylvania Cent. Co., 425 F. Supp. 593, 596-97 (E.D. Penn. 1976) (injunctions sought by SEC pursuant to the Securities Exchange Act of 1934, 15 U.S.C. § 78u). See also SEC v. Int'l Systems Control Corp., [1979] 838 FED. SEC. L. REP. (CCH) 7-8 (injunction



enterprises. Since American corporations must compete against foreign corporations for sales to third parties, unless action is taken on a multinational basis, these foreign competitors have an advantage when dealing with foreign governments.<sup>183</sup> During the congressional hearings, the need for a multinational ban was often discussed<sup>184</sup> and the State Department assured Congress that an effective international treaty would be pursued.<sup>185</sup> This promise has been pursued but has not yet been effectuated.

#### A. *Interest Affected by the FCPA and a Multilateral Treaty*

There are five major types of parties affected by United States legislation prohibiting foreign bribery. An examination of these parties and their interests shows that multinational action, although difficult to achieve, is nevertheless necessary to improve American trade.

The first and most obvious party is an American corporation with operations abroad. The corporation has an interest in maximizing profits, and its ability to do so will be hampered by the FCPA. Although rumors of corporations going out of business or losing significant sales due to the FCPA have been more anecdotal than significant, the situation may change.<sup>186</sup> On the other hand, the existence of the FCPA leaves the American corporation less open to blackmail and threats of extortion, since such payments are subject to disclosure. While FCPA may also make American firms more welcome in nations which are concerned about controlling corruption, American firms should favor an international treaty which would effectively place all companies on

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granted under FCPA) (D.D.C., Dec. 27, 1979).

<sup>183</sup> The competitive effects of the FCPA are still difficult to access. Lockheed, once a major payor, agreed under heavy pressure from the United States government (prior to passage of the FCPA) not to pay any more bribes. Lockheed claims that as a result it lost a jumbo-jet contract for India to a French competitor that had contributed \$1.5 million to the then-ruling Congress Party. *Protecting the Ability of the United States to Trade Abroad*, *supra* note 22, at 11, 61.

<sup>184</sup> The need for a multinational ban was supported by Charles W. Robinson, then Under Secretary of State for Economic Affairs: "Unilateral action alone cannot be an adequate solution to an international problem. Effective international cooperation is the only real answer." *Foreign and Corporate Bribes*, *supra* note 18, at 98. Then-Secretary of Commerce, Elliot Richardson, echoed these attitudes in his appearance before the same committee: "Whatever may be done unilaterally, there is a clear need for a multilateral approach also, given the effort to achieve greater consistency and enforcement worldwide." *Id.* at 104. Chairman Proxmire and Secretary Richardson agreed, however, that some action by the United States was necessary before significant actions could be taken abroad. See also Remarks of Senator Ribicoff, 121 CONG. REC. S36,093 (1975).

<sup>185</sup> *Foreign and Corporate Bribes*, *supra* note 18, at 156 (Statement of Deputy Secretary of State Robert Ingersoll).

<sup>186</sup> See Ulmer, *Southeast Asia: Doing Business in the Third World*, ATLANTIC MONTHLY, Dec. 1978, at 6.

an equal footing.

The second interested party is a multinational corporation based outside the United States. Such a corporation is generally free to make payments in the absence of any specific domestic or international restrictions. Presumably, foreign corporations continue to make these payments. Since the revelations have thus far concerned mainly American firms, there exists no significant public pressure on foreign corporations to stop payments. Moreover, the passage of the FCPA may have given a foreign corporation a competitive advantage over American corporations, solely because of the latter's inability to make proscribed payments. Unless a multinational treaty which is enforceable under the domestic law of the firm's headquarters is created, it will continue past practices.<sup>187</sup> Not surprisingly, therefore, foreign multinational firms would probably oppose any treaty which limits their actions.

The bribe-target nation is another affected party. In many nations there is great concern over the corruption engendered by the presence of corporations willing and able to pay millions of dollars in bribes.<sup>188</sup> These nations should support a multinational treaty. Yet other similarly situated nations have expressed little or no concern over bribery because of the traditional acceptance of such payments and the lack of public awareness. In many of the latter nations, the officials believe they have a right to collect payments as gratuities for representing the corporation to their government.<sup>189</sup> They compare their role to American lobbyists or lawyers. These government officials resent any action to limit this income source and so may be expected to oppose any treaty which would do so.

A fourth interested party is an industrialized foreign nation, e.g., West Germany, Japan and France, whose corporations compete with American firms for sales. These nations have little incentive, apart from moral concerns, to penalize bribes made

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<sup>187</sup> See *Foreign and Corporate Bribes*, *supra* note 18, at 49, 62 (Statements of George Ball and Ian MacGregor).

<sup>188</sup> Prior to the Islamic revolution, Iran took measures to control corruption. See *Protecting the Ability of the United States to Trade Abroad*, *supra* note 22, at 13; IRANIAN PENAL CODE ARTS. 139, 143, 147 (1978), discussed in U.N.E.S.C. Doc. E/5838, *supra* note 94. The efforts of the Shah were insufficient to stem corruption and were heavily criticized.

<sup>189</sup> See *Agent's Fees in the Middle East*, a memorandum approved and circulated by the Defense Security Assistance Agency, reprinted in *Activities of American Multinational Corporations Abroad*, *supra* note 4, at 100-02.

In India, for example, public servants are paid very little and are expected to supplement their income with gratuities. *Protecting the Ability of the United States to Trade Abroad*, *supra* note 22, at 20; Gwirtzman, *supra* note 17, at 101, col. 4.

abroad.<sup>190</sup> Unlike the United States, they do not see themselves as engaged in an ideological struggle and the actions of their firms do not reflect upon the broader East-West conflict. Their corporations have not, thus far, been involved in many public scandals relating to foreign bribery. Three of these competing nations, Japan, Holland, and Italy, however, have themselves been bribe-targets. An awareness of bribery's effects may motivate these nations to act. Pressure from the United States may influence other industrialized nations. Unless these nations feel some pressure, internal or external, they will not help to create an effective treaty.

The final party is the United States government, whose interests lie both in conducting foreign policy and in promoting foreign trade. The American government's interests reflect the congressional objectives in passing the FCPA.<sup>191</sup> While the FCPA furthers these interests, its unilateral prohibitions create an incentive to obtain a multilateral ban. President Carter has expressed dismay over the difficulties the United States has experienced in its attempts to create a multilateral treaty through the United Nations. He blamed the other developed nations for their lack of interest and for their opposition to uniform disclosure rules relating to bribe payments. Developing countries have also given scant support for a multinational treaty and have sought to link the payments problem to the creation of a general code of conduct for multinational enterprises.<sup>192</sup>

The optimal solution to the situation is a multinational treaty, executed simultaneously by all industrial, capital-exporting nations, banning bribery. The State Department is still pressing for such a treaty to unify multinational business practices<sup>193</sup> and to prevent illicit payments.<sup>194</sup>

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<sup>190</sup> West Germany has taken the position that although allowing German companies to deduct foreign bribes on their tax returns is morally indefensible if its laws were changed its firms would be unable to compete. *Protecting the Ability of the United States to Trade Abroad*, *supra* note 22, at 19. The French have increased their share of the world's arms sales by institutionalizing the payment of commissions through the French Defense Ministry. This has earned that Ministry the nickname "LeMinistere des Pots-de-Vin" ("Ministry of Bribes"). The Sunday Telegraph (London), Sept. 7, 1975, reprinted in *Activities of American Multinational Corporations Abroad*, *supra* note 4, at 354.

<sup>191</sup> See notes 20-29 and accompanying text *supra*.

<sup>192</sup> President Jimmy Carter, [1977] U.S. PARTICIPATION IN THE U.N. 124 (1978) [hereinafter cited as U.S. PARTICIPATION].

<sup>193</sup> The United Nations is preparing a Code of Conduct for Multinational Corporations. See 61 U.N. ESCOR, Supp. (No. 5), U.N. Doc. E/5782 (1976); CENTRE ON TRANSNATIONAL CORPORATIONS, *Transnational Corporations; Material Relevant to the Formulation of a Code of Conduct*. U.N. ESCOR Doc. E/C10/18 (1977); CENTRE ON TRANSNATIONAL CORPORATIONS, *International Standards of Accounting and Reporting for Transnational Corporations*, U.N. ESCOR Doc. No. ST/CTC/5 (1977).

<sup>194</sup> While the FCPA was in committee, the Senate passed Resolution 265, instructing

### B. Efforts by the United Nations

The State Department's major effort for a multinational treaty has been in the United Nations. Beginning in 1975, the United States has been active in the United Nations Commission on Transnational Corporations, which produced a "Draft International Agreement to Prevent and Eliminate Illicit Payments in International Commercial Transactions."<sup>195</sup> Hopefully, an agreement will be signed by "Contracting States," who thereby agree to create a domestic law which is essentially equivalent to the FCPA.<sup>196</sup>

The inclusion of Article 7, prohibiting economic ties with South Africa,<sup>197</sup> is still under debate in the Working Group,<sup>198</sup> and further discussion will delay the Agreement's consummation. The United States should follow the General Assembly resolutions referred to in Article 7 and allow its inclusion.<sup>199</sup> Economic ties with an admittedly racist regime should not be allowed to frustrate an agreement of this importance.<sup>200</sup> Moreover, the inclusion of Article 7 will encourage many nations to support the agreement, and if any nation, including the United States, objects,

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United States negotiators at the Geneva Round of Trade Negotiations (G.A.T.T.) and in any other international forum to press for the creation of an international code of conduct to ban bribery. See also § 121 of the Trade Act of 1974, 19 U.S.C. § 2131 (1976).

<sup>195</sup> *Rep. of the Comm. on an Int'l Agreement on Illicit Payments on its First and Second Sessions*, 65 U.N. ESCOR Doc. No. E/1979/104 (Agenda Item 9) (1979), reprinted in 18 INT'L LEGAL MATERIALS 1025 (1979) [hereinafter cited as Draft Agreement].

<sup>196</sup> *Id.* at 1026. The Draft would ban both the offering of a payment to an official in return for a government favor in an "international commercial transaction" and the soliciting of such a payment by a government official. Art. 1(a), (b). The Draft does not cover extortion situations. The Working Group declined explicitly to prohibit extortion or passive bribery, though an inclusion was discussed. Comments on the Draft Agreement, *Id.* at 15. The Draft does not use the concept of corruption. Articles 3-6, and 8-14 are supportive of the enforcement of Article 1. Draft Agreement, *supra* note 195, reprinted in 18 INT'L LEGAL MATERIALS 1025, 1027-28, 1029-40 (1979).

<sup>197</sup> Article 7 requires each contracting State to prohibit its citizens from making "any royalty or tax payment to, or from knowingly transferring any assets or any other financial resources in contravention of United Nations resolutions to facilitate trade with, or investment in a territory occupied by an illegal minority regime in southern Africa." Draft Agreement, *supra* note 195, Art. 7(1). See also COMMISSION ON TRANSNATIONAL CORPORATIONS, *Report on the Fourth Session* 64 U.N. ESCOR Doc. No. E/1978/52, Supp. (No. 12) 19 (1978).

<sup>198</sup> "Ad Hoc Intergovernmental Working Group on the Problem of Corrupt Practices" which created the Draft pursuant to ESCOR Res. 2041, 61 U.N. ESCOR Supp. (No. 1) 17, U.N. Doc. No. E/5889 (1976).

<sup>199</sup> See generally *Report of the Special Committee Against Apartheid*, 33 U.N. GAOR, Supp. (No. 22), U.N. Doc. No. A/33/22 (1978); G.A. Res. 31/6 A-K, 3 U.N. GAOR, Supp. (No. 39) 10-16, Annex, U.N. Doc. No. A/31/39 (1976); G.A. Res. 3411, 30 U.N. GAOR, Supp. (No. 34) 36-39, U.N. Doc. No. A/10034 (1975).

<sup>200</sup> The South African issue has led to a protracted dispute over its inclusion in the Draft. See U.S. PARTICIPATION, *supra* note 192, at 124.

that nation may enter reservations as to any two of the articles.<sup>201</sup> Only Article 7 is outside the scope of the FCPA.

Although the Draft is encouraging, it will be many years before an effective ban is achieved. The agreement must be completed<sup>202</sup> and signed, effective domestic laws must be passed, and, in some nations, enforcement mechanisms must be created before illicit payments are universally halted. Thus, there is little hope for multinational implementation before the late 1980's.

### *C. Efforts by the Organization for Economic Cooperation and Development (OECD)*

One major effort toward international cooperation has been completed through the OECD.<sup>203</sup> The OECD's Declaration on International Investment and Multinational Enterprises, adopted on June 21, 1976,<sup>204</sup> specifies that illegal bribes and improper

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<sup>201</sup> Reservations may not be incompatible with the object and purpose of the Agreement. *Report of the Economic and Social Council Comm. on An Int'l Agreement on Illicit Payments*, 65 U.N. ESCOR Doc. No. E/1979/104 (1979), reprinted in 18 INT'L LEGAL MATERIALS 1025, 1039 (1979). Article 7 is not an integral part of this Agreement, and a reservation of this Article should not be considered incompatible.

<sup>202</sup> The progress of the Draft Agreement has been disappointing. The President had predicted that the Agreement would be presented to the U.N. Economic and Social Council in mid-1977. PRESIDENT JIMMY CARTER, [1976] U.S. PARTICIPATION IN THE U.N., 156 (1977). In mid-1978 the Draft was presented, and the Council created a committee of all interested states to discuss the Draft, delaying possibilities of early enactment. *Report of the Economic and Social Council*, 33 U.N. GAOR Doc. No. A/33/3, Supp. (No. 3) 59-60 (1978). Overriding a recommendation of the Working Group, the U.N. Economic and Social Council has called for a conference of pleni-potentiaries open to all interested states to conclude a final agreement. *Id.* at 59. This conference may convene in 1980, if a necessary quorum can be gathered. Economic and Social Council Decision 1978/71. 64 U.N. ESCOR Doc. No. E/1978/78, Supp. (No. 1) (1979). This is an unnecessary delay; forty-five nations participated in the Working Group and these included all the Western industrial nations. CENTRE ON TRANSNATIONAL CORPORATIONS REP., April 1978, at 7.

The United States should prevent further controversy concerning Article 7 of the U.N. Draft Agreement by supporting its inclusion. The State Department should oppose any meeting of a conference of pleni-potentiaries as superfluous; the Draft satisfies American needs. If further delay in the adoption and implementation of the U.N. Draft occurs, the State Department should attempt to create bilateral agreements with West Germany, France and Japan. An agreement between these nations will effectively prevent corporate bribery and may be easier to achieve than a consensus in the United Nations.

<sup>203</sup> The OECD is the successor institution to the Organization for European Economic Cooperation, which distributed Marshall Aid following the Second World War. H. AUBREY, ATLANTIC ECONOMIC COOPERATION 21-27 (1967). The signatories of the Guidelines comprise twenty-three industrialized countries, including the United States, and account for 60% of the world's industrial production and over 90% of the world's multinational corporations. THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: A BUSINESS APPRAISAL 5 (P. Coolidge, G. Spina & D. Wallace eds. 1977).

The International Chamber of Commerce has also been active in combatting extortion and bribery. See *Extortion and Bribery in Business Transactions*, the report of the I.C.C. Commission on Ethical Practices, reprinted in 17 INT'L LEGAL MATERIALS 417 (1978).

<sup>204</sup> The Code of Conduct is divided into two sections, one of which, "Guidelines for

participation in local political activities should be avoided.<sup>205</sup>

The OECD Guidelines require the disclosure of certain pertinent information. Thus, multinational enterprises provide information on their structures, activities and policies to improve public understanding. This disclosure supplements the information required to be disclosed under the national law of the countries within which multinationals operate. The guidelines specifically require nine disclosures, of which four are relevant to bribery.<sup>206</sup> These four relate to the capital structure and holdings of the enterprise, and are different in effect from the accounting standards of the FCPA.<sup>207</sup>

The OECD guidelines are wholly voluntary and are not legally enforceable. Moreover, they are vague, and often merely ask the corporation to obey the laws of the host nation. The guidelines condemn only "improper" or legally impermissible activities. Nonetheless, the OECD is an influential organization among industrial governments, and it may prompt these nations to enact internal legislation.

### CONCLUSION

The FCPA was prompted by immense public outcry, both here and abroad, following the revelations about bribery in Japan, the Netherlands and Italy. The Congress reacted by unanimously

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Multinational Enterprises; General Policies," specifically deals with illicit payments. See Vogelar, *Multinational Enterprises: The Guidelines in Practice*, OECD OBSERVER, May 1977, at 7-8.

<sup>205</sup> Enterprises should

(7) not render and they should not be solicited or expected to render any bribe or other improper benefit, direct or indirect, to any public servant or holder of public office; (8) unless legally permissible, not make contributions to candidates for political office or to political parties or other political organizations; (9) abstain from any improper involvement in local political activities.

OECD OBSERVER, July/August 1976, at 12-13. These Guidelines are far broader than the FCPA and the U.N. Draft Agreement, prohibiting even "grease money."

<sup>206</sup> Disclosure under the OECD should include:

(i) the structure of the enterprise, showing the name and location of the parent company, its main affiliates, its percentage ownership, direct and indirect, in these affiliates, including shareholdings between them;  
 (ii) the geographical areas where the operations are carried out and the principal activities carried on therein by the parent company and the main affiliates;  
 (iii) the operating results and sales by geographical area and the sales in the major lines of business for the enterprise as a whole;  
 (iv) significant new capital investment by geographical area and, as far as practicable, by major lines of business for the enterprise.

*Id.* at 13-14. See also Freedman, *International Minimum Disclosure and Procedural Rules*, 5 SEC REG. L.J. 259 (1977). These Guidelines are not specifically designed to detect bribery, and thus, even full compliance could leave many bribes undetected.

<sup>207</sup> The FCPA requires controls over the spending and recording; the disclosure of material facts are then required under the Securities Exchange Act of 1934.

passing the FCPA. The "crisis," however, has disappeared from the headlines, and now two tasks remain to be accomplished: courts must clarify the FCPA's prohibitions, and the State Department must achieve an effective international prohibition.

Corruption in government contracts has become one of the most serious ethical questions in recent years. The Act will be constructive in preventing corruption in developed nations where transactions are more openly reported and enforcement capabilities are stronger so that wrongdoing may be detected. These are also the nations whose governmental integrity most concerns the United States. Third world nations worried about the detrimental effects of corruption should welcome the Act. On the other hand, in other countries where illicit payments are an accepted, noncontroversial method of business, the Act may become a trap for basically honest businessmen. There is no convenient answer for the executive faced with a payment demand from abroad. If he or she accedes, the payment may be discovered and he or she may be imprisoned. If the payment is refused, the business may be destroyed. Only the courts, by adopting a flexible, relative definition of corruption, and the State Department, by achieving a multinational prohibition, can blunt the horns of this dilemma.

—*Fredric Bryan Lesser*